

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/1. NATURE AND FORMATION/(1) THE RELATION OF AGENCY/1. Nature of the relation of agency.

## **AGENCY (**

### **1. NATURE AND FORMATION**

#### **(1) THE RELATION OF AGENCY**

##### **1. Nature of the relation of agency.**

The terms 'agency' and 'agent' have in popular use a number of different meanings<sup>1</sup>, but in law the word 'agency' is used to connote the relation which exists where one person has an authority or capacity to create legal relations between a person occupying the position of principal and third parties<sup>2</sup>.

The relation of agency arises whenever one person, called the 'agent', has authority<sup>3</sup> to act on behalf of another, called the 'principal'<sup>4</sup>, and consents so to act. Whether that relation exists in any situation depends not on the precise terminology employed by the parties to describe their relationship, but on the true nature of the agreement or the exact circumstances of the relationship between the alleged principal and agent<sup>5</sup>. If an agreement in substance contemplates the alleged agent acting on his own behalf, and not on behalf of a principal, then, although he may be described in the agreement as an agent, the relation of agency will not have arisen<sup>6</sup>. Conversely the relation of agency may arise despite a provision in the agreement that it shall not<sup>7</sup>.

A servant or an independent contractor, though not necessarily the employer's agent, may often have authority to act as such when relations with third parties are involved<sup>8</sup>. Nevertheless an agent, as such, is not a servant. An agent, although bound to exercise his authority in accordance with all lawful instructions which may be given to him from time to time by his principal, is not, unless he is also the servant of the principal, subject in the exercise of his authority to the direct control or supervision of the principal<sup>9</sup>.

The essence of the agent's position is that he is only an intermediary between two other parties, and it is therefore essential to an agency in this sense that a third party should be in existence or contemplated<sup>10</sup>. If a person who is employed as an agent to buy or sell property for another seeks to sell his own property to his principal or to buy the property of his principal, he violates the first condition of his employment, and changes the intrinsic nature of the contract between them<sup>11</sup>.

1 For other uses of these terms see PARA 2. See also *Kennedy v De Trafford* [1897] AC 180 at 188, HL, per Lord Herschell ('No word is more commonly and constantly abused than the word 'agent'. A person may be spoken of as an 'agent' and no doubt in the popular sense of the word may properly be said to be an 'agent', although when it is attempted to suggest that he is an 'agent' under such circumstances as create the legal obligations attaching to agency that use of the word is only misleading').

2 *International Harvester Co of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Co* (1958) 100 CLR 644, Aust HC; *Town of Timmins v Brewers' Warehousing Co Ltd* [1962] OR 536, Ont CA.

3 For the ways in which the agent's authority may be conferred or arise see PARA 29.

4 *Wolff v Horncastle* (1798) 1 Bos & P 316; *Pole v Leask* (1863) 33 LJ Ch 155; *Samson v Aitchison* [1912] AC 844, PC; *Atlantic Mutual Insurance Co v King* [1919] 1 KB 307; *Pratt v Patrick* [1924] 1 KB 488; *Brooke v Bool* [1928] 2 KB 578. Authority may be implied from the subsequent assent of the principal: see PARAS 57-70.

5 *Re Nevill, ex p White* (1871) 6 Ch App 397, CA; *Bennett v Smith* (1852) 16 Jur 421; *De Bussche v Alt* (1878) 8 ChD 286, CA; *Samuel Bros Ltd v Whetherley* [1908] 1 KB 184, CA; *National Bank of Scotland Ltd v Shaw* 1913 SC 133; *Re Cotton, ex p Cooke* (1913) 108 LT 310, CA; *Gibson v O'Keeney* [1928] NI 66, CA; *Salsi v Jetspeed Air Services Ltd* [1977] 2 Lloyd's Rep 57.

A person appointed to carry on the business of a person incapable of managing his affairs or under a deed of arrangement for the benefit of creditors is an agent: *Plumpton v Burkinshaw* [1908] 2 KB 572, CA; *GB Nicholls & Co Ltd v Knapman* (1910) 102 LT 306, CA.

By the Consumer Credit Act 1974 s 56 antecedent negotiations are conducted by the negotiator as agent for the creditor under a regulated agreement: see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 768.

There is no general rule that an insurance company when instructing repairs to be done to a policy-holder's vehicle is acting as agent for the policy-holder: *Godfrey Davis Ltd v Culling and Hecht* [1962] 2 Lloyd's Rep 349, CA; *Cooter and Green Ltd v Tyrrell* [1962] 2 Lloyd's Rep 377, CA; *Kirkland's Garage (Kinross) Ltd v Clark* 1967 SLT (Sh Ct) 60.

A sheriff's officer does not, merely by seeking and obtaining advice from a landlord's solicitor, become the landlord's agent: *Barclays Bank Ltd v Roberts* [1954] 3 All ER 107, [1954] 1 WLR 1212, CA.

For a consideration of the relationship between a bank and its client where the bank facilitates the transfer of money from abroad into the United Kingdom see *Thomson (Inspector of Taxes) v Moyse* [1961] AC 967, [1960] 3 All ER 684, HL.

As to the position of a confirming house see PARA 12 note 1.

6 See *Re Nevill, ex p White* (1871) 6 Ch App 397, CA (affd sub nom *John Towle & Co v White* (1873) 29 LT 78, HL); *Livingstone v Ross* [1901] AC 327, PC; *Michelin Tyre Co Ltd v Macfarlane (Glasgow) Ltd* 1917 55 SLR 35, HL (retailer described as agent but held to be buyer); *Kitson v PS King & Son Ltd* (1919) 36 TLR 162 (agency commission terms in publishing trade do not establish relation of principal and agent); *WT Lamb & Sons v Goring Brick Co Ltd* [1932] 1 KB 710, CA (merchants appointed 'sole selling agents' held to be purchasers from their alleged principal); *Dental Manufacturing Co Ltd v C De Trey & Co* [1912] 3 KB 76, CA (purchaser described as having an 'exclusive agency'). See also *Handley Page Ltd v Customs and Excise Comrs and Rockwell Machine Tool Co Ltd* [1971] 2 Lloyd's Rep 298, CA (person paying import deposit not an agent for purchaser for whom goods imported, even though purchaser's name entered on form as person making payment of deposit).

7 *Customs and Excise Comrs v Pools Finance (1937) Ltd* [1952] 1 All ER 775, CA.

8 See eg *Archer v Moss*, *Applegate v Moss* [1971] 1 QB 406, [1971] 1 All ER 747, CA (builder, an independent contractor, held to be agent of developer for purposes of the Limitation Act 1939 s 26(b) (repealed: see now the Limitation Act 1980 s 32; and **LIMITATION PERIODS** vol 68 (2008) PARA 1220 et seq)). As to whether the servant of A can simultaneously be the agent of B in respect of the same piece of work see *Sykes v Millington* [1953] 1 QB 770, [1953] 1 All ER 1098, DC.

9 *Wolff v Horncastle* (1798) 1 Bos & P 316; *Barnett v South London Tramways Co* (1887) 18 QBD 815, CA.

10 *Re Moline, ex p Dyster* (1816) 2 Rose 349; *Wilson v Short* (1848) 6 Hare 366.

11 *Robinson v Mollett* (1875) LR 7 HL 802; *De Bussche v Alt* (1878) 8 ChD 286, CA; *Re Moline, ex p Dyster* (1816) 2 Rose 349; *Armstrong v Jackson* [1917] 2 KB 822. See also PARA 89.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/1. NATURE AND FORMATION/(1) THE RELATION OF AGENCY/2. Other uses of the word 'agent'.

## 2. Other uses of the word 'agent'.

In addition to describing a person employed to create contractual relations between two parties, the word 'agent' is used in at least two other senses. Thus it is often used in business in a non-legal sense to refer to a distributor, as in the case of the appointment of a 'sole selling agent', 'exclusive agent', or 'authorised agent'<sup>1</sup>. The relation so established between the

appointor and appointee is usually that of vendor and purchaser<sup>2</sup> and no contractual relationship is established between the appointor of the agent and third parties by the sale of goods by the so-called agent to those third parties. The word 'agent' is also frequently used to describe the position of a person who is employed by another to perform duties often of a technical or professional nature which he discharges as that other's alter ego and not merely as an intermediary between the principal and the third party<sup>3</sup>. Thus a solicitor may be his client's agent for the purpose of instituting or continuing legal proceedings on his behalf<sup>4</sup>. Similarly where a person other than a servant is permitted by the owner of a vehicle to drive it for the owner's purposes, the driver will be the owner's agent for the purpose of making the owner vicariously liable for the driver's negligence in driving<sup>5</sup>.

1 See the cases cited in PARA 1 note 5.

2 See *WT Lamb & Sons v Goring Brick Co Ltd* [1932] 1 KB 710, CA.

3 The distinction between a professional man and his client and the usual case of principal and agent affects the client's rights to the ownership and possession of working papers, etc; see *London School Board v Northcroft* (1889) 2 Hudson's BC (4th Edn) 147, 11th edn 230 (quantity surveyors); *Leicestershire County Council v Michael Faraday & Partners Ltd* [1941] 2 KB 205, [1941] 2 All ER 483, CA (valuers); *Chantrey Martin & Co v Martin* [1953] 2 QB 286, [1953] 2 All ER 691, CA (accountants); *Customs and Excise Comrs v Johnson* [1980] STC 624 (organiser of educational courses).

4 As to the limits of a solicitor's authority see **LEGAL PROFESSIONS** vol 66 (2009) PARA 786 et seq.

5 *Wheatley v Patrick* (1837) 2 M & W 650; *Samson v Aitchison* [1912] AC 844, PC; *Smith v Moss* [1940] 1 KB 424, [1940] 1 All ER 469; *Hewitt v Bonvin* [1940] 1 KB 188, CA; *Ormrod v Crosville Motor Services Ltd* [1953] 2 All ER 753, [1953] 1 WLR 1120, CA; *Vandyke v Fender (Sun Insurance Office Ltd, third party)* [1970] 2 QB 292, [1970] 2 All ER 335, CA; but see *Morgans v Launchbury* [1973] AC 127, [1972] 2 All ER 606, HL (permission by the owner coupled only with an 'interest or concern' on the owner's part in the object of the journey does not create an agency). As to torts committed by agents see generally PARAS 150-151.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/1. NATURE AND FORMATION/(2) COMPETENCY OF PARTIES/(i) Competency of Principals/3. General rule.

## **(2) COMPETENCY OF PARTIES**

### **(i) Competency of Principals**

#### **3. General rule.**

It may be stated as a general proposition that whatever a person has power to do himself he may do by means of an agent<sup>1</sup>. The converse proposition similarly holds good that what a person cannot do himself he cannot do by means of an agent<sup>2</sup>. It is, in general, necessary to ascertain who is legally competent to act or contract<sup>3</sup> in order to know who is competent to be a principal.

There are, however, two exceptions to the general rule that a person may do by means of an agent whatever he has power to do himself, and these are:

- 1 (1) where the transaction is required by statute<sup>4</sup> to be evidenced by the signature of the principal himself<sup>5</sup>; and
- 2 (2) where the competency to do the act arises by virtue of the holding of some public office or by virtue of some power, authority or duty of a personal nature and requiring skill or discretion for its exercise<sup>6</sup>, or where a statute imposes on a person a duty which he is not free to delegate<sup>7</sup>.

There are certain classes of persons who are incompetent, or have only a limited capacity, to contract or act as principals<sup>8</sup>.

1 *Bevan v Webb* [1901] 2 Ch 59, CA; *Re Whitley Partners Ltd* (1886) 32 ChD 337, CA (memorandum of association of a company may be subscribed by an agent); *Compagnie Générale Trans-Atlantique v Thomas Law & Co, La Bourgogne* [1899] AC 431, HL; *Tharsis Sulphur and Copper Co v Société Industrielle et Commerciale des Métaux* (1889) 58 LJQB 435 (a foreign corporation may appoint an agent to accept service of writ); *Furnivall v Hudson* [1893] 1 Ch 335 (an agent may be appointed to execute a bill of sale); *R v Longnor (Inhabitants)* (1833) 1 Nev & MKB 576; *Foreman v Great Western Rly Co* (1878) 38 LT 851 (a principal who can read may appoint an agent who cannot read to sign a document); *Foster v Fyfe* [1896] 2 QB 104.

The principle set out in the text to this note was cited with approval in *Lancashire County Council v Mason* [1998] ICR 907, EAT.

A partner may employ an agent (to whom no reasonable objection can be taken, and on the agent undertaking not to use information) to examine partnership books under the Partnership Act 1890 s 24(9): see *Bevan v Webb*; and **PARTNERSHIP** vol 79 (2008) PARA 136; cf also the Limited Partnerships Act 1907 s 6(1); and **PARTNERSHIP** vol 79 (2008) PARA 226. An agent may be appointed to execute a deed of arrangement under the Deeds of Arrangement Act 1914: see *Re Wilson* [1916] 1 KB 382, CA (reversing the Divisional Court but without affecting this point); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARAS 860-861, 865-866.

2 *Bateman v Mid-Wales Rly Co* (1866) LR 1 CP 499; *Poulton v London and South Western Rly Co* (1867) LR 2 QB 534; *Ashbury Railway Carriage and Iron Co Ltd v Riche* (1875) LR 7 HL 653; *Montreal Assurance Co v M'Gillivray* (1859) 13 Moo PCC 87. The principle set out in the text to this note was cited with approval in *Lancashire County Council v Mason* [1998] ICR 907, EAT.

3 As to capacity to contract see **CONTRACT** vol 9(1) (Reissue) PARA 630.

4 Eg by the Statute of Frauds Amendment Act 1828 s 6, which provides that a representation concerning character, credit, etc, is not actionable unless made in writing signed by the party to be charged.

5 *Williams v Mason* (1873) 28 LT 232; *Hirst v West Riding Union Banking Co Ltd* [1901] 2 KB 560, CA. Cf *Re Whitley Partners Ltd* (1886) 32 ChD 337, CA; *Swift v Jewsbury and Goddard* (1874) LR 9 QB 301; *Re Prince Blücher, ex p Debtor* [1931] 2 Ch 70, CA.

A person cannot be added or substituted as a claimant to proceedings unless he has given his signed, written consent and such consent is filed with the court: see CPR 19.4(4); *Practice Direction--Addition and Substitution of Parties* PD19 paras 2.1, 2.2; and **CIVIL PROCEDURE** vol 11 (2009) PARA 214. Cf *Fricker v Van Grutten* [1896] 2 Ch 649, CA (decided under RSC Ord 16 r 11), requiring the signature of the plaintiff himself; and **CIVIL PROCEDURE** vol 11 (2009) PARA 533. Particulars of claim signed by a solicitor's clerk, however, were held to be 'signed by the solicitor' within the County Court Rules 1889 (*France v Dutton* [1891] 2 QB 208; see now CPR Pt 19; *Practice Direction--Addition and Substitution of Parties* PD19; and **CIVIL PROCEDURE** vol 11 (2009) PARA 210 et seq), and in general an agent may sign where the statute does not expressly or impliedly require personal signature of the principal: see eg *Dennison v Jeffs* [1896] 1 Ch 611; see also *LCC v Vitamins Ltd, LCC v Agricultural Food Products Ltd* [1955] 2 QB 218, [1955] 2 All ER 229, CA; *Tennant v LCC* (1957) 121 JP 428, CA (all cases of signatures by assistant to person authorised to sign notices to quit); *UBAF Ltd v European American Banking Corpn, The Pacific Colcotronis* [1984] QB 713, [1984] 2 All ER 226, CA (a representation signed on behalf of a limited company by its duly authorised agent acting within the scope of his authority constitutes a representation by the company for the purposes of the Statute of Frauds Amendment Act 1828 s 6).

6 *Re Great Southern Mysore Gold Mining Co* (1882) 48 LT 11, CA (the nomination of an official liquidator by a judge cannot be performed by an agent). Accordingly, a power of attorney does not empower the agent to swear an affidavit verifying a list of documents on behalf of his principal: *Clauss v Pir* [1988] Ch 267, [1987] 2 All ER 752.

7 *Omnibus Conveyance Co Ltd v Liverpool United Tramways and Omnibus Co* (1882) 26 Sol Jo 580 per Chitty J; *Corsellis v LCC* [1908] 1 Ch 13, CA; *Ticehurst and District Water and Gas Co Ltd v Gas and Waterworks Supply and Construction Co Ltd* (1911) 55 Sol Jo 459 per Warrington J. The principle does not apply to the performance of ministerial acts, eg by an independent contractor: see *Corsellis v LCC*. As to the nature of performance of duties by officers in government departments see PARA 49.

8 See PARAS 4-8. For the power of trustees and personal representatives to employ agents see the Trustee Act 2000 s 11; and **TRUSTS** vol 48 (2007 Reissue) PARA 989.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/1. NATURE AND FORMATION/(2) COMPETENCY OF PARTIES/(i) Competency of Principals/4. Alien enemies.

#### 4. Alien enemies.

During the period of hostilities with the country of which he is a subject, an alien enemy is wholly incompetent to contract or act as a principal<sup>1</sup>. The outbreak of war dissolves a continuing agency agreement between a British subject<sup>2</sup> and an enemy alien which involves intercourse with the enemy<sup>3</sup>, although an *administrateur-séquestre* appointed by the French court is entitled to receive dividends payable to an enemy alien resident in France<sup>4</sup> and a power of attorney given by a principal in an enemy-occupied territory is not abrogated on his leaving that territory and going to a country in alliance with Her Majesty, and thus temporarily dividing himself from his agent by the line of war<sup>5</sup>.

1 *O'Mealey v Wilson* (1808) 1 Camp 482.

2 As to the status of a British subject see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARAS 9, 66-71.

3 *Hugh Stevenson & Sons Ltd v Aktiengesellschaft für Cartonnagen Industrie* [1918] AC 239, HL; see also *Nordisk Insulinlaboratorium v Gorgate Products Ltd (sued as CL Bencard (1934) Ltd)* [1953] Ch 430, [1953] 1 All ER 986, CA.

4 *Lepage v San Paulo Copper Estates Ltd* (1917) 33 TLR 457.

5 *Hangkam Kwintong Woo v Liu Lan Fong (alias Liu Ah Lan)* [1951] AC 707, [1951] 2 All ER 567, PC.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/1. NATURE AND FORMATION/(2) COMPETENCY OF PARTIES/(i) Competency of Principals/5. Minors.

#### 5. Minors.

In general, where a minor<sup>1</sup> can lawfully do an act on his own behalf, so as to bind himself, he can appoint an agent to do it on his behalf<sup>2</sup>; where, however, a minor's contract is voidable at common law<sup>3</sup>, it does not matter that he has appointed an agent to contract for him<sup>4</sup>. An agent can bind a minor in respect of necessities<sup>5</sup>, and also in respect of those contracts which at common law must be expressly renounced by the minor on attaining majority in order to be rendered void<sup>6</sup>. A power of attorney given by a minor, other than a married woman, is void<sup>7</sup>. A principal who is a minor is not liable for a tort committed by his agent, unless committed by his direct command<sup>8</sup>, but a minor can authorise his agent to expel a trespasser, and the agent may plead such authority by way of defence in a claim by the trespasser<sup>9</sup>.

1 A minor is a person who has not attained the age of 18: see the Family Law Reform Act 1969 s 1; and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 3.

2 *G (A) v G (T)* [1970] 2 QB 643 at 652, [1970] 3 All ER 546 at 549, CA, per Lord Denning MR, explaining his judgment in *Re Shephard, Shephard v Cartwright* [1953] Ch 728, [1953] 2 All ER 608, CA; revsd on other grounds [1955] AC 431, [1954] 3 All ER 649, HL. See also the Minors' Contracts Act 1987, which disapples and repeals the Infants Relief Act 1874; and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 14.

3 Or, if made before 9 June 1987 (ie the date on which the Minors' Contracts Act 1987 was brought into force by virtue of s 5(2)), void by virtue of the Infants Relief Act 1874 (repealed by the Minors' Contracts Act 1987). See note 2.

4 *Edwards v Carter* [1893] AC 360, HL; *G (A) v G (T)* [1970] 2 QB 643, [1970] 3 All ER 546, CA; *Chaplin v Leslie Frewin (Publishers) Ltd* [1966] Ch 71, [1965] 3 All ER 746, CA.

5 As to a minor's liability for necessities and what are necessities see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARAS 18-19.

6 *Whittingham v Murdy* (1889) 60 LT 956.

7 *Zouch d Abbot and Hallet v Parsons* (1765) 3 Burr 1794.

8 *Burnard v Haggis* (1863) 14 CBNS 45.

9 *Ewer v Jones* (1846) 9 QB 623.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/1. NATURE AND FORMATION/(2) COMPETENCY OF PARTIES/(i) Competency of Principals/6. Mentally disordered persons.

## 6. Mentally disordered persons.

A person suffering from a mental disorder has a restricted capacity to contract generally<sup>1</sup>, and therefore to act by an agent<sup>2</sup>, but he may be held liable on contracts made by an agent by virtue of an estoppel<sup>3</sup> or made during a lucid interval<sup>4</sup>. Statutory provision is made for the management of the affairs and dealings with the property of mentally disordered persons<sup>5</sup> and in connection with the creation and exercise of powers of attorney which are designed to survive the donor's subsequent mental incapacity<sup>6</sup>.

1 See **MENTAL HEALTH** vol 30(2) (Reissue) PARA 600 et seq.

2 See **MENTAL HEALTH** vol 30(2) (Reissue) PARA 606.

3 See PARA 25; and **MENTAL HEALTH** vol 30(2) (Reissue) PARA 606.

4 See *Drew v Nunn* (1879) 4 QBD 661, CA; and **MENTAL HEALTH** vol 30(2) (Reissue) PARAS 602, 606.

5 See the Mental Capacity Act 2005; and **MENTAL HEALTH** vol 30(2) (Reissue) PARAS 671-764.

6 See PARAS 194-238.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/1. NATURE AND FORMATION/(2) COMPETENCY OF PARTIES/(i) Competency of Principals/7. Intoxicated persons.

## 7. Intoxicated persons.

A person may avoid a contract entered into by him while he was in such a state of intoxication as not to know what he was doing, but a person contracting with him may enforce the contract if he can prove that he had no knowledge of, and took no advantage of, the drunkenness<sup>1</sup>. A person who contracted when drunk may ratify his contract on becoming sober<sup>2</sup>.

1 See *Gore v Gibson* (1845) 13 M & W 623; and **CONTRACT** vol 9(1) (Reissue) PARA 717.

2 *Matthews v Baxter* (1873) LR 8 Exch 132.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/1. NATURE AND FORMATION/(2) COMPETENCY OF PARTIES/(i) Competency of Principals/8. Corporations.

## 8. Corporations.

At common law it is an incident to a corporation created by Royal Charter<sup>1</sup> to use its common seal for the purpose of binding itself to anything to which a natural person could bind himself and to deal with its property as a natural person might deal with his own<sup>2</sup>. If the powers of the corporation are limited by the Charter, those limits are enforceable by a declaration of the court<sup>3</sup>.

Corporations incorporated by statute<sup>4</sup> are subject to the common law doctrine of ultra vires, that is, what is not expressly or by implication authorised in the statute must be taken to have been forbidden<sup>5</sup>. This rule has been construed liberally, so that a company can do acts which it is not expressly authorised to do, provided that they are reasonably incidental to its main objects<sup>6</sup> provided those main objects are still being pursued<sup>7</sup>.

The power of the board of directors of a company incorporated under the Companies Acts<sup>8</sup> to bind the company, or to authorise others to do so, is deemed to be free of any limitation under the company's constitution as regards a person dealing in good faith<sup>9</sup>. A person is presumed to have dealt in good faith unless the contrary is proved<sup>10</sup>. This is so even if that person has not inquired about the capacity of the company, or the powers of the directors<sup>11</sup>. Moreover, he is not to be regarded as acting in bad faith by reason only of his knowing that an act is beyond the powers of the directors under the company's constitution<sup>12</sup>.

1 As to the creation of corporations by Royal Charter see **CORPORATIONS** vol 9(2) (2006 Reissue) PARAS 1128, 1130 et seq.

2 *Sutton's Hospital Case* (1612) 10 Co Rep 1a, Ex Ch; *Hazell v Hammersmith and Fulham London Borough Council* [1992] 2 AC 1, [1991] 1 All ER 545, HL.

3 See generally *Pharmaceutical Society of Great Britain v Dickson* [1970] AC 403, [1968] 2 All ER 686, HL.

4 As to incorporation by statute see **CORPORATIONS** vol 9(2) (2006 Reissue) PARAS 1128, 1143-1145.

5 *Ashbury Railway Carriage and Iron Co Ltd v Riche* (1875) LR 7 HL 653.

6 *Foster v London, Chatham and Dover Rly Co* [1895] 1 QB 711, CA.

7 *Re Salisbury Railway and Market House Co Ltd* [1969] 1 Ch 349, [1967] 1 All ER 813.

8 As to the incorporation of a company under the Companies Acts see **COMPANIES** vol 14 (2009) PARA 24 et seq.

9 See the Companies Act 1985 s 35A(1); and **COMPANIES** vol 14 (2009) PARA 263. A party to a transaction with a company need not inquire as to whether it is permitted by the memorandum or as to any limitations on the directors' powers: see s 35B; and **COMPANIES** vol 14 (2009) PARA 263. Sections 35A, 35B apply also to unregistered companies: see s 718(1), Sch 22; the Companies (Unregistered Companies) Regulations 1985, SI 1985/680; and **COMPANIES** vol 15 (2009) PARAS 1665-1666.

Note that, as from a day to be appointed, the Companies Act 1985 is repealed and replaced by the Companies Act 2006: at the date at which this volume states the law no such day had been appointed.

10 See the Companies Act 1985 s 35A(2)(c); and **COMPANIES** vol 14 (2009) PARA 263.

11 See the Companies Act 1985 s 35B; and **COMPANIES** vol 14 (2009) PARA 263.

12 See the Companies Act 1985 s 35A(2)(b); and **COMPANIES** vol 14 (2009) PARA 263.

## UPDATE

### 8 Corporations

NOTE 9--SI 1985/680 replaced: Unregistered Companies Regulations 2009, SI 2009/2436.

NOTE 10--Date appointed for repeal of Companies Act 1985 ss 35A, 35B, 718(1) (replaced by Companies Act 2006 s 40) is 1 October 2009: SI 2008/2860.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/1. NATURE AND FORMATION/(2) COMPETENCY OF PARTIES/(ii) Competency of Agents/9. Capacity to act.

### (ii) Competency of Agents

#### 9. Capacity to act.

An agent's competency to act or contract for his principal is not limited to his competency to contract for himself<sup>1</sup>. Thus a minor<sup>2</sup> may be an agent, and act and contract so as to bind the principal, although not personally liable on the contract of agency or on contracts with third parties, even in cases where an agent of full contractual capacity would have been personally liable<sup>3</sup>. A partner who is a minor can therefore bind the firm and partnership assets in respect of acts done in furtherance of the objects of the partnership<sup>4</sup>.

1 *Kirby v Great Western Rly Co* (1868) 18 LT 658; *Re D' Angibau, Andrews v Andrews* (1880) 15 ChD 228, CA. An agent who cannot read may bind by his signature a principal who can read: *Foreman v Great Western Rly Co* (1878) 38 LT 851.

2 As to a minor see PARA 5.

3 *Smally v Smally* (1700) 1 Eq Cas Abr 6.

4 *Goode and Bennion v Harrison* (1821) 5 B & Ald 147. As to minors as partners see **PARTNERSHIP** vol 79 (2008) PARA 33.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/1. NATURE AND FORMATION/(2) COMPETENCY OF PARTIES/(ii) Competency of Agents/10. Special qualification or restriction.

#### 10. Special qualification or restriction.

In the case of certain classes of agents, such as solicitors, the law requires a qualification before they can act<sup>1</sup>. A county court bailiff must be authorised in writing by the judge to act as broker on an execution, and can then act without any other licence<sup>2</sup>, and a bailiff to levy a distress must also be certificated by a judge<sup>3</sup>.

No person who is contracting as a principal can act as agent to the other party to the contract for the purpose of signing a note or memorandum thereof so as to satisfy the provisions of the Statute of Frauds<sup>4</sup>. The same person may, however, act as agent of both parties for that purpose<sup>5</sup>.



1 A solicitor must be qualified before he can act and there are penalties for acting while unqualified (see the Solicitors Act 1974 ss 20, 21; and **LEGAL PROFESSIONS** vol 65 (2008) PARAS 589, 591). A solicitor must also take out an annual practising certificate, and where he has no certificate his client cannot always recover costs from the other party, nor can the solicitor recover costs from the client: see s 25; and **LEGAL PROFESSIONS** vol 65 (2008) PARA 590. As to loss of right to remuneration see PARA 110.

2 See the County Courts Act 1984 s 96; and **COURTS** vol 10 (Reissue) PARA 733.

3 See the Law of Distress Amendment Act 1888 s 7; and **DISTRESS** vol 13 (2007 Reissue) PARA 994.

4 *Sharman v Brandt* (1871) LR 6 QB 720; *Wright v Dannah* (1809) 2 Camp 203; *Farebrother v Simmons* (1822) 5 B & Ald 333. The provisions mentioned in the text are contained in the Statute of Frauds (1677) s 4, which now relates only to contracts of guarantee (see further **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1052 et seq); in so far as contracts for the sale of land are concerned see now the Law of Property (Miscellaneous Provisions) Act 1989 s 2; and **SALE OF LAND** vol 42 (Reissue) PARA 29.

5 *Hinde v Whitehouse* (1806) 7 East 558 (auctioneer); *Wilson & Sons v Pike* [1949] 1 KB 176, [1948] 2 All ER 267, CA; *Bird v Boulter* (1833) 1 Nev & MKB 313 (auctioneer's clerk); *Durrell v Evans* (1862) 1 H & C 174 (factor); *Thompson v Gardiner* (1876) 1 CPD 777. As to an auctioneer's authority to sign for a bidder at an auction see *Chaney v Maclow* [1929] 1 Ch 461, CA; and **AUCTION** vol 2(3) (Reissue) PARA 206.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/1. NATURE AND FORMATION/(3) CLASSES OF AGENTS/11. Special or general agents.

### (3) CLASSES OF AGENTS

#### 11. Special or general agents.

The authorities draw a distinction between special agents and general agents<sup>1</sup>. A special agent is one who has authority to act for some special occasion or purpose which is not within the ordinary course of his business or profession<sup>2</sup>, whereas a general agent is one who has authority, arising out of and in the ordinary course of his business or profession, to do some act or acts on behalf of his principal in relation thereto, or one who is authorised to act on behalf of the principal generally in transactions of a particular kind or incidental to a particular business<sup>3</sup>.

1 See eg *Smith v M'Guire* (1858) 3 H & N 554.

2 *Brady v Todd* (1861) 9 CBNS 592.

3 *Smith v M'Guire* (1858) 3 H & N 554; *Brady v Todd* (1861) 9 CBNS 592; *Barrett v Irvine* [1907] 2 IR 462, CA; *Kinahan & Co Ltd v Parry* [1910] 2 KB 389 (revsd on particular facts [1911] 1 KB 459, CA). Thus a factor, broker, auctioneer or estate agent who is authorised to do any act in the ordinary course of his business is a general agent in relation to that employment, as is a steward or manager of a business on an estate. As to the agency of a partner for other partners see the Partnership Act 1890 s 5; and **PARTNERSHIP** vol 79 (2008) PARA 45. As to the agency of members of a limited liability partnership see PARA 22.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/1. NATURE AND FORMATION/(3) CLASSES OF AGENTS/12. Mercantile agents.

#### 12. Mercantile agents.

A mercantile agent is one having, in the customary course of his business as such agent, authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods<sup>1</sup>. An agent may be a mercantile agent although he has no

general occupation as an agent or has only one customer<sup>2</sup>, or although his general occupation is that of an independent dealer in the commodity entrusted to him<sup>3</sup>, provided that he acts in the transaction in question in his capacity as mercantile agent<sup>4</sup>; but he must not be a mere servant or shopman<sup>5</sup>. An agent entrusted with goods on sale or return on terms that they were not to become his property and that his remuneration should be a share of the profits on sale is a mercantile agent<sup>6</sup>. An agent may still be a mercantile agent so as to transfer to a bona fide purchaser a title to goods which will be protected by the Factors Act 1889<sup>7</sup>, although in accepting the agency the agent intends to disregard its terms and to act fraudulently for his own benefit, provided there is no error by the principal as to the identity of the agent and the principal intends to give the agent possession of the goods<sup>8</sup>.

A 'factor' is a mercantile agent who in the ordinary course of business is entrusted with possession of goods or of the documents of title thereto<sup>9</sup>, and a 'broker' is a mercantile agent who in the ordinary course of his business is employed to make contracts for the purchase or sale of property or goods of which he is not entrusted with the possession or documents of title<sup>10</sup>.

1 See the Factors Act 1889 s 1(1); the Sale of Goods Act 1979 s 26; *Inglis v Robertson and Baxter* [1898] AC 616, HL. An historical account of the law on this subject is to be found in *Official Assignee of Madras v Mercantile Bank of India Ltd* [1935] AC 53, PC. For a judicial definition of the term 'mercantile agent' see *Oppenheimer v Attenborough & Son* [1908] 1 KB 221, CA. See also *Lloyds Bank Ltd v Bank of America National Trust and Savings Association* [1938] 2 KB 147, [1938] 2 All ER 63, CA (pledgers of bills of lading entrusted with the bills to sell them are mercantile agents of the pledgees). The business of a confirming house is not that of a mercantile agent: *Rusholme and Bolton and Roberts Hadfield Ltd v S G Read & Co (London) Ltd* [1955] 1 All ER 180, [1955] 1 WLR 146; *Tellrite Ltd v London Confirmers Ltd* [1962] 1 Lloyd's Rep 236.

As to the authority of a mercantile agent to dispose of goods in his possession see PARAS 148-149.

2 *Lowther v Harris* [1927] 1 KB 393.

3 *Weiner v Harris* [1910] 1 KB 285, CA.

4 *Oppenheimer v Frazer and Wyatt* [1907] 1 KB 519 (revsd on another point [1907] 2 KB 50, CA); *Staffs Motor Guarantee Ltd v British Wagon Co Ltd* [1934] 2 KB 305; *Budberg v Jerwood and Ward* (1934) 51 TLR 99.

5 *Lowther v Harris* [1927] 1 KB 393.

6 *Weiner v Harris* [1910] 1 KB 285, CA.

7 See PARA 148.

8 *Pearson v Rose and Young Ltd* [1951] 1 KB 275, [1950] 2 All ER 1027, CA, following views expressed in *Folkes v King* [1923] 1 KB 282, CA, and disapproving the opinion expressed in *Oppenheimer v Frazer and Wyatt* [1907] 2 KB 50, CA; *Du Jardin v Beadman Bros Ltd* [1952] 2 QB 712, [1952] 2 All ER 160; and see also *Turner v Sampson* (1911) 27 TLR 200; *Lake v Simmons* [1927] AC 487, HL; *Lloyds Bank Ltd v Bank of America National Trust and Savings Association* [1938] 2 KB 147, [1938] 2 All ER 63, CA.

9 *Baring v Corrie* (1818) 2 B & Ald 137; *Stevens v Biller* (1883) 25 ChD 31, CA. As to the implied authority of a factor see PARA 43.

10 *Milford v Hughes* (1846) 16 M & W 174; *Foster v Pearson* (1835) 1 Cr M & R 849; *Baring v Corrie* (1818) 2 B & Ald 137.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/1. NATURE AND FORMATION/(3) CLASSES OF AGENTS/13. Other classes of agents.

### 13. Other classes of agents.

A forwarding agent is one who undertakes the shipment or transmission of goods<sup>1</sup>. There is a custom of the trade that a forwarding agent incurs personal liability for freight charges whether transmission is by sea or by air; with the result that after paying cost of freight he can recover such payment even from a disclosed principal<sup>2</sup>. His duties in relation to goods do not cease once the goods have been dispatched but he has a duty to facilitate, or at least not to impede, their safe arrival<sup>3</sup>. His duty, generally, is to exercise reasonable care<sup>4</sup>.

An insurance agent or insurance broker is employed to negotiate and effect policies of insurance<sup>5</sup>.

A del credere agent is one who, usually for extra remuneration, undertakes to indemnify his employer against loss<sup>6</sup> arising from the failure of persons with whom he contracts to carry out their contracts<sup>7</sup>. A del credere agency may be inferred from facts showing that the agent was charging an additional commission for risk<sup>8</sup>. Such an agent need not be appointed in writing<sup>9</sup>, the agreement not being an agreement to answer for the debt, default or miscarriage of another within the meaning of the Statute of Frauds<sup>10</sup>.

An auctioneer is an agent who is employed to sell at a public auction. He may be agent for both seller and buyer<sup>11</sup> and may or may not be entrusted with possession of the goods or property to be sold or of the documents of title thereto<sup>12</sup>.

An estate agent is a person who, in connection with the acquisition or disposal of any land or other premises, brings together or takes steps to bring together the person wishing to dispose thereof and a person prepared to acquire it, or undertakes to do either of those things, or who acts or undertakes to act as auctioneer, or, in the case of a proposed transaction, negotiates or undertakes to negotiate as to the terms on behalf of either party<sup>13</sup>.

1 It is for this reason that they were known as forwarding agents. The nature of the operations carried out by a forwarder, and the contractual arrangements under which he does so, may render such a person a principal rather than an agent (see eg *Lee Cooper Ltd v CH Jeakins & Sons Ltd* [1967] 2 QB 1, [1965] 1 All ER 280, where it was held that a forwarding agent had incurred liability as a principal; cf *EW Taylor & Co (Forwarding) Ltd v Bell* [1968] 2 Lloyd's Rep 63, and the cases cited in notes 4, 5). This title is concerned only with the forwarder in the role of agent.

2 *Perishables Transport Co Ltd v N Spyropoulos (London) Ltd* [1964] 2 Lloyd's Rep 379. In *Cory Bros Shipping Ltd v Baldan Ltd* [1997] 2 Lloyd's Rep 58 the forwarding agents who gave no notice that they were acting as agents were held personally liable for unpaid freight.

3 *Langley Beldon & Gaunt Ltd v Morley* [1965] 1 Lloyd's Rep 297.

4 *Pringle of Scotland Ltd v Continental Express Ltd* [1962] 2 Lloyd's Rep 80.

5 See **INSURANCE** vol 25 (2003 Reissue) PARA 69. The common practice of Lloyd's brokers whereby, having negotiated a policy for their client, they act in certain respects as agents for underwriters when the client makes a claim, has been disapproved: see *Anglo-African Merchants Ltd v Bayley* [1970] 1 QB 311, [1969] 2 All ER 421; *North and South Trust Co v Berkeley, Berkeley v North and South Trust Co* [1971] 1 All ER 980, [1971] 1 WLR 470; and see PARA 89.

6 The mere signing of a deed of assignment does not establish a loss: *Montagu Stanley & Co v JC Solomon Ltd* [1932] 2 KB 287, CA. The loss must be quantified before the duty to indemnify arises: *Rusholme and Bolton and Roberts Hadfield Ltd v SG Read & Co (London) Ltd* [1955] 1 All ER 180, [1955] 1 WLR 146.

7 *Morris v Cleasby* (1816) 4 M & S 566; *Grove v Dubois* (1786) 1 Term Rep 112; *Hornby v Lacy* (1817) 6 M & S 166; *Churchill and Sim v Goddard* [1937] 1 KB 92, [1936] 1 All ER 675, CA. As to the distinction between the relationship of principal and del credere agent and that of buyer (retailer) and seller (manufacturer) see *Michelin Tyre Co Ltd v Macfarlane (Glasgow) Ltd* (1916) 54 SLR 1 (affd (1917) 55 SLR 35, HL); and as to the liability of a del credere agent in disputes between his principal and the other contracting party see *Thomas Gabriel & Sons v Churchill and Sim* [1914] 3 KB 1272, CA.

8 *Shaw v Woodcock* (1827) 7 B & C 73. Mere description in the contract as del credere agent does not make the agent a del credere agent of the other contracting party: *Nouvelles Huileries Anversoises SA v HC Mann & Co* (1924) 40 TLR 804.

9 *Couturier v Hastie* (1852) 8 Exch 40; *Sutton & Co v Grey* [1894] 1 QB 285, CA; *Wickham v Wickham* (1855) 2 K & J 478; *Harburg India Rubber Comb Co v Martin* [1902] 1 KB 778, CA. See also **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARAS 1063, 1255.

10 See the Statute of Frauds (1677) s 4; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1058 et seq.

11 See the cases cited in PARA 10 note 5.

12 See **AUCTION** vol 2(3) (Reissue) PARAS 201, 206.

13 This definition is based on that in the Restriction on Agreements (Estate Agents) Order 1970, SI 1970/1696, art 2(1) (revoked). That order rendered unlawful agreements and arrangements between estate agents relating to the charges, the advertising of the charges and the recommending of the charges for the supply of their services as estate agents in connection with the disposal of unfurnished dwellings. The Estate Agents Act 1979 (which imposes a degree of control on the activities of estate agents) does not define 'estate agent' but defines instead the term 'estate agency work': see PARA 240. Estate agents often also act as managing agents of residential leasehold property. As to the implied authority of an estate agent see PARA 41.

## UPDATE

### 13 Other classes of agents

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/1. NATURE AND FORMATION/(4) FORMATION OF AGENCY/(i) Circumstances in which Agency May Arise/14. Method of creation.

## (4) FORMATION OF AGENCY

### (i) Circumstances in which Agency May Arise

#### 14. Method of creation.

The relation of agency is created by the express or implied agreement of principal and agent<sup>1</sup>. The relation can also be created by ratification by the principal of the agent's acts done on his behalf<sup>2</sup>. Express agency is created where the principal, or some person authorised by him, expressly appoints the agent, whether by deed, by writing under hand, or orally<sup>3</sup>. Implied agency<sup>4</sup> arises from the conduct or situation of the parties<sup>5</sup>, or by operation of law, for example from necessity<sup>6</sup>.

An agency may also be created by statute. For example, a dealer acting in respect of certain hire purchase agreements is by statute deemed to be the agent of the owner or the seller of the goods under the agreement for the purposes of service of notice of cancellation and other notices and in respect of representations made by the dealer with respect to the goods<sup>7</sup>. A statutory agency arises in respect of the unpaid seller of goods exercising his right to resell<sup>8</sup>.

1 *Pole v Leask* (1863) 33 LJ Ch 155; *Re Consort Deep Level Gold Mines Ltd, ex p Stark* [1897] 1 Ch 575, CA; *Love v Mack* (1905) 93 LT 352, CA; *Garnac Grain Co Inc v HMF Faure and Fairclough Ltd* [1968] AC 1130n, [1967] 2 All ER 353, HL; *Morgans v Launchbury* [1973] AC 127, [1972] 2 All ER 606, HL.

2 *Markwick v Hardingham* (1880) 15 ChD 339, CA; and see PARAS 57-70.

3 *Gosling v Gaskell* [1897] AC 575, HL; *Re Hale, Lilley v Foad* [1899] 2 Ch 107, CA; *Re Vimbos Ltd* [1900] 1 Ch 470.

4 Whereas the expression 'implied agency' is used in contradistinction to the expression 'express agency,' the expression 'implied authority' is used to describe an extension of an express authority which is necessary to give the express authority full business efficacy.

5 *Watson v Threlkeld* (1798) 2 Esp 637; *Ryan v Sams* (1848) 12 QB 460 (cohabitation as man and wife); *Trent v Hunt* (1853) 9 Exch 14 (mortgagor implied agent of mortgagee); *Vandyke v Fender (Sun Insurance Office Ltd, third party)* [1969] 2 QB 581, [1969] 3 All ER 1291 (on appeal [1970] 2 QB 292, [1970] 2 All ER 335, CA) (driving fellow employees to work on behalf of employer); *G (A) v G (T)* [1970] 2 QB 643, [1970] 3 All ER 546, CA (admissions of paternity made by parents of father who was a minor); *Townsend's Carriers Ltd v Pfizer Ltd* (1977) 33 P & CR 361 (sister companies as agents of lessor and lessee); *Potter (t/a P & R Potter Wholesale) v Customs and Excise Comrs* [1985] STC 45, CA ('Tupperware' distributors sell as principals, not agents); *Cronin (t/a Cronin Driving School) v Customs & Excise Comrs* [1991] STC 333 (driving school supplying services to the public via agency of self-employed driving instructors). See also *Redbank Schools Ltd v Abdullahzadeh* (1995) 95 LGR 176, CA (implied agency will not arise on a landowner's mere knowledge that his licensee is purporting to grant a tenancy in the land, where rent is being paid to, and kept by, the licensee); and *Lemmerbell Ltd v Britannia LAS Direct Ltd* [1998] 3 EGLR 67, [1998] 48 EG 188, CA (landlord demanding and accepting rent and insurance premiums from third party on tenant's instructions not enough to establish third party as tenant's agent). See also **AUCTION** vol 2(3) PARAS 206-207 (agency of auctioneer); **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 256 et seq (agency of spouse); **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 429 et seq (agency of master); the cases cited in PARA 2 (relation of agency); PARA 25 (agency by estoppel); and PARAS 37-44 (implied authority of agents).

6 As to agency of necessity see PARA 24.

7 See the Consumer Credit Act 1974 s 57 (withdrawal), s 69 (cancellation), s 102 (rescission); and **CONSUMER CREDIT** vol 9(1) (Reissue) PARAS 181, 185, 260.

8 See the Sale of Goods Act 1979 s 48(3); and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 282.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/1. NATURE AND FORMATION/(4) FORMATION OF AGENCY/(ii) Agency by Agreement/15. When a deed is necessary.

## (ii) Agency by Agreement

### 15. When a deed is necessary.

Where an agent is given power to execute a deed, that power must itself be contained in a deed<sup>1</sup>. Certain acts are required, either by statute or common law, to be by deed, the chief of which include<sup>2</sup>:

- 3 (1) conveyances, including mortgages, charges, vesting declarations and vesting instruments, of land or any interest in land<sup>3</sup>;
- 4 (2) leases of land for a term which originally exceeds three years or under which a lower rent is reserved than the best rent which can reasonably be obtained without taking a fine<sup>4</sup>;
- 5 (3) instruments effecting certain dispositions of registered land<sup>5</sup>;
- 6 (4) transfers of shares in companies under the Companies Clauses Consolidation Act 1845<sup>6</sup>;
- 7 (5) bills of sale<sup>7</sup>; and

- 8 (6) under the common law, a contract without consideration<sup>8</sup>.

The necessity for appointment by deed of an agent for the purpose of executing an instrument as a deed does not, however, exist where the execution of the instrument is in the presence of the principal, when, at his request, someone signs on his behalf and in his name<sup>9</sup>, and an agent who executes a deed, though not authorised by deed, may bind his principal if a deed was not required by law in such a case<sup>10</sup>. The authority to contract for, but not to execute, a lease of lands for a term exceeding three years may be given orally<sup>11</sup>.

1 *Steiglitz v Egginton* (1815) Holt NP 141; *Berkeley v Hardy* (1826) 5 B & C 355. Where a deed has been executed in escrow, delivery of the escrow by an agent is ineffective unless the agent has been authorised under seal: *Windsor Refrigerator Co Ltd v Branch Nominees Ltd* [1961] Ch 88, [1960] 2 All ER 568; revsd on another point [1961] Ch 375, [1961] 1 All ER 277, CA.

2 As to the circumstances in which deeds are required see generally **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 10 et seq. A company within the meaning of the Companies Act 1985 (see **COMPANIES** vol 14 (2009) PARAS 1, 24) may under the law of England and Wales, by writing under the common seal, empower any person to execute deeds on its behalf, as its attorney, in any place not situate in the United Kingdom: see s 38(1); and **COMPANIES** vol 14 (2009) PARA 289.

Note that, as from a day to be appointed, the Companies Act 1985 is repealed and replaced by the Companies Act 2006: at the date at which this volume states the law no such day had been appointed.

3 See the Law of Property Act 1925 s 52(1); and **REAL PROPERTY** vol 39(2) (Reissue) PARA 232.

4 See the Law of Property Act 1925 ss 52(1), (2)(d), 54(2); **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARAS 101-102; **REAL PROPERTY** vol 39(2) (Reissue) PARA 232.

5 See the Land Registration Rules 2003, SI 2003/1417, rr 114, 161, 206, Sch 3 Form 6, Sch 4 Form C, Sch 7 paras 4, 6, 12, Sch 9; and **LAND REGISTRATION** vol 26 (2004 Reissue) PARAS 895, 897, 903, 914, 959, 1009, 1087.

6 See the Companies Clauses Consolidation Act 1845 s 14; and **COMPANIES** vol 15 (2009) PARA 1716.

7 See the Bills of Sale Act (1878) Amendment Act 1882 s 9, Schedule; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 1711.

8 See **CONTRACT** vol 9(1) (Reissue) PARA 621.

9 *Ball v Dunsterville* (1791) 4 Term Rep 313 (a deed executed for a partner in his presence); *R v Longnor (Inhabitants)* (1833) 4 B & Ad 647 (where the parties, who were unable to write, requested someone to execute the deed in their presence).

10 *Hunter v Parker* (1840) 7 M & W 322 (where the addition of a seal to the agent's contract of sale was not required for its validity). The requirement of a seal for the valid execution of a deed was abolished by the Law of Property (Miscellaneous Provisions) Act 1989 s 1(1).

11 *Callaghan v Pepper* (1840) 2 I Eq R 399; *Mortlock v Buller* (1804) 10 Ves 292.

## UPDATE

### 15 When a deed is necessary

NOTE 5--SI 2003/1417 r 206 amended, Sch 4 substituted: SI 2008/1919.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/1. NATURE AND FORMATION/(4) FORMATION OF AGENCY/(ii) Agency by Agreement/16. Powers of attorney.

### 16. Powers of attorney.

Where the authority of the agent is required to be conferred by a deed<sup>1</sup>, or where in any other circumstances it is desired formally to appoint an agent to act for the principal in one transaction or a series of transactions or to manage the affairs of the principal generally, the necessary authority is conferred by an instrument known as a power of attorney<sup>2</sup>. Such powers are the subject of statutory provision, which specifies the method of execution<sup>3</sup>, the proof of instruments creating such powers<sup>4</sup>, the revocability<sup>5</sup> and the effect of revocation of powers<sup>6</sup>. Powers of attorney may also be created which will survive any subsequent mental incapacity of the donor<sup>7</sup>.

Subject as stated below, an instrument creating a power of attorney must be executed as a deed by the donor of the power<sup>8</sup>. This requirement is, however, without prejudice to any requirement in, or having effect under, any other Act<sup>9</sup> as to the witnessing of instruments creating powers of attorney, and does not affect the rules relating to the execution of instruments by bodies corporate<sup>10</sup>.

1 See PARA 15. As to the execution of deeds by the agent see PARA 45.

2 A general statutory form of power of attorney is provided by the Powers of Attorney Act 1971 s 10(1), Sch 1; and by the Powers of Attorney (Welsh Language Forms) Order 2000, SI 2000/215, art 3, Schedule Pt II. See further PARA 30.

3 See the Powers of Attorney Act 1971 s 1; and the text and notes 8-10.

4 See the Evidence and Powers of Attorney Act 1940 s 4; the Powers of Attorney Act 1971 s 3; and PARA 17.

5 See the Powers of Attorney Act 1971 s 4; and PARA 175.

6 See the Powers of Attorney Act 1971 ss 5-7; and PARAS 45, 193.

7 See the Enduring Powers of Attorney Act 1985 (repealed); the Mental Capacity Act 2005 ss 9-14, Sch 1; and PARAS 194-238. As to the effect of the Enduring Powers of Attorney Act 1985 on existing grants of a power of attorney see *Practice Direction* [1986] 2 All ER 42.

8 Powers of Attorney Act 1971 s 1(1) (amended by the Law of Property (Miscellaneous Provisions) Act 1989 s 1(8), Sch 1 para 6).

9 See eg the Trustee Act 1925 s 25; and **TRUSTS** vol 48 (2007 Reissue) PARA 984.

10 Powers of Attorney Act 1971 s 1(3). As to execution by bodies corporate see PARAS 20-23.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/1. NATURE AND FORMATION/(4) FORMATION OF AGENCY/(ii) Agency by Agreement/17. Proof of instruments creating powers of attorney.

## **17. Proof of instruments creating powers of attorney.**

The contents of an instrument creating a power of attorney may be proved<sup>1</sup> by means of a copy which is a reproduction of the original made with a photographic or other device for reproducing documents in facsimile<sup>2</sup>, and contains a certificate or certificates signed by the donor of the power or by a solicitor, duly certified notary public<sup>3</sup> or stockbroker<sup>4</sup> that the copy is a true and complete copy of the original<sup>5</sup>, and, where the original consists of two or more pages, that each page is a true and complete copy of the corresponding page of the original<sup>6</sup>. The certificate must appear at the end of a single page document or at the end of each page where the document consists of more than one page<sup>7</sup>. Where a copy has been made in compliance with these requirements the contents of such an instrument may also be proved by means of a copy of that copy if the further copy has, *mutatis mutandis*, also been made in

compliance with those requirements<sup>8</sup>. Special provision is made in connection with instruments creating powers of attorney which were deposited before 1 October 1971<sup>9</sup>.

- 1 This provision is without prejudice to the Evidence and Powers of Attorney Act 1940 s 4 (amended by the Statute Law Revision Act 1950; and the Supreme Court Act 1981 s 154, Sch 7) (which provides for certain documents or instruments creating powers of attorney registered or deposited in Scotland or Northern Ireland to be sufficient evidence without further proof of their contents, deposition or registration) or to any other method of proof authorised by law: Powers of Attorney Act 1971 s 3(4). As to methods of proving the contents of documents see generally **CIVIL PROCEDURE** vol 11 (2009) PARA 876 et seq.
- 2 Powers of Attorney Act 1971 s 3(1)(a).
- 3 As to the meaning of 'duly certificated notary public' see the Solicitors Act 1974 s 87(1); and **LEGAL PROFESSIONS** vol 66 (2009) PARA 1412 (definition applied by the Powers of Attorney Act 1971 s 3(3) (amended by the Courts and Legal Services Act 1990 s 125(2), Sch 17)).
- 4 'Stockbroker' means a member of any stock exchange within the meaning of the Stock Transfer Act 1963 (see s 4(1); and **COMPANIES** vol 14 (2009) PARA 400) or the Stock Transfer Act (Northern Ireland) 1963: Powers of Attorney Act 1971 s 3(3).
- 5 Powers of Attorney Act 1971 s 3(1)(b)(i) (s 3(1)(b) amended by the Courts and Legal Services Act 1990 Sch 17).
- 6 Powers of Attorney Act 1971 s 3(1)(b)(ii) (as amended: see note 5).
- 7 Powers of Attorney Act 1971 s 3(1)(b)(i), (ii) (as amended: see note 5).
- 8 Powers of Attorney Act 1971 s 3(2).
- 9 See the Supreme Court Act 1981 s 134 (amended by the Courts Act 2003 s 109(1), Sch 8 para 262(c); prospectively amended by the Constitutional Reform Act 2005 s 59(5), Sch 11 para 26). 1 October 1971 is the date on which the Powers of Attorney Act 1971 was brought into force by s 11(4) (repealed). As from a day to be appointed, the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59, Sch 11 para 1. At the date at which this volume states the law no such day had been appointed.

## UPDATE

### 17 Proof of instruments creating powers of attorney

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

TEXT AND NOTE 3--Reference to duly certified notary public now to authorised person: Powers of Attorney Act 1971 s 3(1)(b) (amended by Legal Services Act 2007 Sch 21 para 26(a)). 'Authorised person' means a person (other than a solicitor) who, for the purposes of the Legal Services Act 2007, is an authorised person in relation to an activity which is a reserved legal activity (within the meaning of that Act) (see **LEGAL PROFESSIONS** vol 65 (2008) PARA 512); Powers of Attorney Act 1971 s 3(3) (amended by Legal Services Act 2007 Sch 21 para 26(b)).

NOTE 9--Day appointed is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/1. NATURE AND FORMATION/(4) FORMATION OF AGENCY/(ii) Agency by Agreement/18. Agent for the purchase of land.

### 18. Agent for the purchase of land.



Writing is not necessary in the case of an appointment of an agent to purchase land, although contracts for the sale or other disposition of an interest in land can only be made in writing<sup>1</sup>.

Subject to what is said in the following paragraph<sup>2</sup>, an agreement relating to land may be signed by or on behalf of each party to the contract<sup>3</sup>, that is by the principal or by his lawfully authorised agent, whether the authority is given orally or otherwise<sup>4</sup>; and the principal may prove the oral creation of an agency and enforce the contract against both the agent and the other party to the contract<sup>5</sup>. The rule that declarations of trust in land must be proved by writing<sup>6</sup> does not invalidate the oral appointment of an agent to purchase land, as such an agent is not a trustee unless and until the land has been conveyed to him, but an intermediary, whose contract vests the equitable estate in the principal<sup>7</sup>; and, further, as the court did not allow the Statute of Frauds<sup>8</sup> to be made an instrument of fraud, an agent to whom land purchased on behalf of his principal has been conveyed is not permitted to plead the present statute against the principal, for whom he is a trustee<sup>9</sup>.

1 See *Cave v Mackenzie* (1877) 46 LJ Ch 564; the Law of Property (Miscellaneous Provisions) Act 1989 s 2(1); and **SALE OF LAND** vol 42 (Reissue) PARA 29.

2 See PARA 19.

3 See the Law of Property (Miscellaneous Provisions) Act 1989 s 2(3); and **SALE OF LAND** vol 42 (Reissue) PARA 29.

4 See *Clinan v Cooke* (1802) 1 Sch & Lef 22; *Brooks v Billingham* (1912) 56 Sol Jo 503; *North v Loomes* [1919] 1 Ch 378; and **SALE OF LAND** vol 42 (Reissue) PARAS 38-40.

5 *Heard v Pilley* (1869) 4 Ch App 548; *Cave v Mackenzie* (1877) 46 LJ Ch 564.

6 See the Law of Property Act 1925 s 53(1)(b); and **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 24.

7 *Cave v Mackenzie* (1877) 46 LJ Ch 564.

8 The Statute of Frauds (1677) ss 3, 7-9 (repealed) which are replaced by the Law of Property Act 1925 s 53 (see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 24).

9 The rule thus stated was accepted in *Longfield Parish Council v Robson* (1913) 29 TLR 357. The contrary view was once held (*Bartlett v Pickersgill* (1760) 1 Cox Eq Cas 15), and was recognised as still law in *James v Smith* [1891] 1 Ch 384, CA, but very grave doubt has been cast upon it: see *Booth v Turle* (1873) LR 16 Eq 182; *Davies v Otty (No 2)* (1865) 35 Beav 208; *Haigh v Kaye* (1872) 7 Ch App 469; and *Rochefoucauld v Boustead* [1897] 1 Ch 196, CA, in which *James v Smith* was adversely criticised by the Court of Appeal.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/1. NATURE AND FORMATION/(4) FORMATION OF AGENCY/(ii) Agency by Agreement/19. Agent to sign written contract.

## 19. Agent to sign written contract.

Even in cases where the signature of a principal is required by statute, an agent may be appointed orally or in any other informal manner to sign for him, unless the statute expressly requires the agent, if any, to be authorised by writing<sup>1</sup>, or expressly or impliedly requires a personal signature, and so renders an agent incompetent to sign at all<sup>2</sup>. Thus an agent informally appointed may sign a memorandum of association<sup>3</sup>, or a consent to a dissolution of a building society<sup>4</sup>.

Subject, therefore, to the requirements already mentioned, an agent's authority may be conferred orally, but the agency agreement itself must be evidenced by writing<sup>5</sup>.

1 See eg the Law of Property Act 1925 s 53; and **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 24.

2 *Fricker v Van Grutten* [1896] 2 Ch 649, CA; and see PARA 3 note 5.

3 *Re Whitley Partners Ltd* (1886) 32 ChD 337, CA. As to a company's memorandum and articles of association see **COMPANIES** vol 14 (2009) PARA 227 et seq.

4 See the Building Societies Act 1986 s 87; *Dennison v Jeffs* [1896] 1 Ch 611; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARAS 2066-2069.

5 *Mortlock v Buller* (1804) 10 Ves 292; *Coles v Trecothick* (1804) 9 Ves 234; *Deverell v Lord Bolton* (1812) 18 Ves 505. The common law rule, *qui facit per alium facit per se*, will not be restricted except where a statute requires personal signature; see eg PARA 3 text and notes 4, 5.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/1. NATURE AND FORMATION/(4) FORMATION OF AGENCY/(ii) Agency by Agreement/20. Agents of corporations generally.

## 20. Agents of corporations generally.

Where an act is required to be by deed<sup>1</sup> in order to be effective, the requirement applies to corporations and other persons equally, and so an authority to an agent in such a case must be conferred by deed<sup>2</sup>. By statute, a corporation may, however, also contract through its officers either in writing or orally, and the authority to an agent to enter into such contracts may be conferred informally<sup>3</sup>. This power is in addition to and largely replaces the earlier general statutory power of the governing body of a corporation to appoint by resolution or otherwise an agent to execute instruments which are not deeds<sup>4</sup>.

1 For examples of acts which are required to be by deed see PARA 15.

2 As to the appointment of agents by corporations generally see **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1273.

3 See the Corporate Bodies' Contracts Act 1960 s 1(1); and **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1272. These provisions do not apply to companies formed and registered under the Companies Act 1985, or to existing companies as defined in that Act, or to a limited liability partnership: see the Corporate Bodies' Contracts Act 1960 s 2; and **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1261. Similar provisions do, however, apply to such companies: see the Companies Act 1985 s 36; and **COMPANIES** vol 14 (2009) PARA 282. As to provisions applicable to joint stock companies incorporated by special Act see the Companies Clauses Consolidation Act 1845 s 97; and **COMPANIES** vol 15 (2009) PARA 1775. As to the provisions applicable to limited liability partnerships see PARA 22. As to contracts by industrial and provident societies see the Industrial and Provident Societies Act 1965 s 29; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 2488.

Note that, as from a day to be appointed, the Companies Act 1985 is repealed and replaced by the Companies Act 2006: at the date at which this volume states the law no such day had been appointed.

4 See the Law of Property Act 1925 s 74(2); and **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1273. As to the execution of conveyances by an agent appointed by a corporation or by a corporate agent see the Law of Property Act 1925 s 74(3), (4); PARA 45; and **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1267.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/1. NATURE AND FORMATION/(4) FORMATION OF AGENCY/(ii) Agency by Agreement/21. Companies subject to the Companies Act 1985.

## **21. Companies subject to the Companies Act 1985.**

Provision is made for the contractual formalities to be observed by companies registered under the Companies Act 1985 and by existing companies as defined by that Act<sup>1</sup>. Companies defined by the Companies Acts were specifically excluded from the provisions of the Corporate Bodies' Contracts Act 1960<sup>2</sup>. Although these two sets of provisions are not identical, they are very similar in effect<sup>3</sup>. Any person acting under a company's authority, express or implied, may contract on its behalf, and any formalities required by law in the case of a contract made by an individual also apply, unless a contrary intention appears, to a contract made on behalf of a company<sup>4</sup>.

1 See the Companies Act 1985 ss 36, 36A, 36AA, 36B; and **COMPANIES** vol 14 (2009) PARA 282 et seq. In connection with companies incorporated outside the United Kingdom see the Foreign Companies (Execution of Documents) Regulations 1994, SI 1994/950; and **COMPANIES** vol 14 (2009) PARAS 282, 288. As to the meaning of 'existing company' for the purposes of the Companies Act 1985 see s 735(1)(b); and **COMPANIES** vol 14 (2009) PARA 14.

Note that, as from a day to be appointed, the Companies Act 1985 is repealed and replaced by the Companies Act 2006: at the date at which this volume states the law no such day had been appointed.

2 See the Corporate Bodies' Contracts Act 1960 s 2; PARA 20; and **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1261.

3 Prior to the enactment of the Corporate Bodies' Contracts Act 1960, it was not contemplated that there should be any difference in effect between the two sets of provisions: see the Eighth Report of the Law Reform Committee (Cmnd 622); 223 HL Official Report (5th series) col 1296; and 623 HC Official Report (6th series) col 838.

4 See the Companies Act 1985 s 36; and **COMPANIES** vol 14 (2009) PARA 282.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/1. NATURE AND FORMATION/(4) FORMATION OF AGENCY/(ii) Agency by Agreement/22. Limited liability partnerships.

## **22. Limited liability partnerships.**

As in the case of ordinary partnerships<sup>1</sup>, every member of a limited liability partnership<sup>2</sup> is the agent of the partnership<sup>3</sup>. However, a limited liability partnership is not bound by anything done by a member in dealing with a person if the member in fact has no authority to act for the partnership by doing that thing, and the person knows that he has no authority or does not know or believe him to be a member of the partnership<sup>4</sup>.

Where a person has ceased to be a member of a limited liability partnership, he is to be regarded (in relation to any person dealing with the partnership) as still being a member of the partnership unless the person has notice that the former member has ceased to be a member of the partnership, or notice that the former member has ceased to be a member of the partnership has been delivered to the registrar<sup>5</sup>.

Where a member of a limited liability partnership is liable to any person (other than another member of the partnership) as a result of a wrongful act or omission of his in the course of the business of the partnership or with its authority, the partnership is liable to the same extent as the member<sup>6</sup>.

- 1 See **PARTNERSHIP** vol 79 (2008) PARA 45.
- 2 As to the meaning of 'limited liability partnership' see the Limited Liability Partnerships Act 2000 s 1; and **PARTNERSHIP** vol 79 (2008) PARA 234.
- 3 Limited Liability Partnerships Act 2000 s 6(1).
- 4 Limited Liability Partnerships Act 2000 s 6(2).
- 5 Limited Liability Partnerships Act 2000 s 6(3). The registrar referred to is the Registrar of Companies (see **COMPANIES** vol 14 (2009) PARA 131 et seq; see s 18).
- 6 Limited Liability Partnerships Act 2000 s 6(4).

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/1. NATURE AND FORMATION/(4) FORMATION OF AGENCY/(ii) Agency by Agreement/23. Local authorities.

### **23. Local authorities.**

The contracts of every local authority<sup>1</sup> and therefore contracts appointing an agent of a local authority must comply with its standing orders<sup>2</sup>, but a person contracting with a local authority need not inquire whether the standing orders applicable to the particular contract have been complied with in any case where, apart from such standing orders, the contract would have been valid<sup>3</sup>.

1 As to the meaning of 'local authority' for these purposes see **LOCAL GOVERNMENT** vol 69 (2009) PARA 23. These provisions are also applicable to National Park authorities (see the Environment Act 1995 s 65(7), Sch 8 para 3(1); and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 642), and to joint authorities, police authorities, the Broads Authority and the London Fire and Emergency Planning Authority (see the Local Government Act 1972 ss 146A(1)(a), (1A)(a), 265A(1)(f)).

2 See *R v Hereford Corpn, ex p Harrower* [1970] 3 All ER 460, [1970] 1 WLR 1424, DC (a decision under the Local Government Act 1933 s 266 (repealed)). The replacing provision in the Local Government Act 1972 s 135(2), (3) (see **LOCAL GOVERNMENT** vol 69 (2009) PARA 492) does not, except in the case of contracts for the supply of goods or materials or for the execution of works, require the making of or compliance with standing orders. Power is, however, given to make standing orders (see s 135(1)), but contracts made without compliance with any orders are not invalidated (see s 135(4)).

3 See the Local Government Act 1972 s 135(4); and **LOCAL GOVERNMENT** vol 69 (2009) PARA 492.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/1. NATURE AND FORMATION/(4) FORMATION OF AGENCY/(iii) Agency of Necessity/24. Agency of necessity.

### **(iii) Agency of Necessity**

#### **24. Agency of necessity.**

Agency of necessity is said to arise in a limited number<sup>1</sup> of cases where, by reason of an emergency either the relation of principal and agent is deemed to exist between persons not otherwise in contractual relations<sup>2</sup> or authority to act on behalf of another is implied as between persons already in contractual relations<sup>3</sup>. The term was formerly used to describe the right of a deserted wife who was in need to pledge her husband's credit for necessities<sup>4</sup>. Most of the cases have reference to sea or land carriage, when, to prevent destruction of the ship, cargo or

goods, the shipmaster or carrier has to take prompt action in excess of his instructions<sup>5</sup>. The occurrence of exceptional circumstances during the carrying out of the act of agency, from the nature of the contract itself, necessitates its extension in the interests of both principal and agent; of the principal because otherwise his property or interests might be sacrificed, and of the agent so that he will have the necessary authority to preserve them and acquire rights against third parties for his principal and against the principal in respect of his own remuneration or indemnity. The authority arises only under urgent necessity<sup>6</sup>; and, if questioned, it will lie upon the party contracting with the agent to show that such was the nature of the circumstances<sup>7</sup>. Thus the bailee of non-perishable goods, which he has undertaken to store until demanded, is not an agent of necessity to sell them simply because their continued storage has become inconvenient for him and he is temporarily unable to obtain instructions from the bailor as to their disposal<sup>8</sup>.

The conditions which entitle an agent to exceed his authority under the doctrine of necessity are:

- 9 (1) that he could not communicate with his principal<sup>9</sup>;
- 10 (2) that the course he took was necessary in the sense that it was in the circumstances the only reasonable and prudent course to take<sup>10</sup>; and
- 11 (3) that he acted bona fide in the interest of the parties concerned<sup>11</sup>.

At the same time, though a strong case is required, it is not essential that any other course should be an impossibility<sup>12</sup>.

1 It has been suggested that the doctrine could extend to vendor and purchaser (*Prager v Blatspiel, Stamp and Heacock Ltd* [1924] 1 KB 566) and to bailor and gratuitous bailee (*Sachs v Miklos* [1948] 2 KB 23, [1948] 1 All ER 67, CA), though in neither case did an agency of necessity arise on the facts; but see the criticism by Scrutton LJ in *Jebara v Ottoman Bank* [1927] 2 KB 254 at 271, CA (revsd (without dealing with this criticism) sub nom *Ottoman Bank v Jebara* [1928] AC 269, HL). See also *Dimurro v Charles Caplin & Co* (1969) 211 Estates Gazette 31 (solicitor stakeholder paid rent out of deposit to salvage lease: no agency of necessity); and *Croskery v Gee* [1957] NZLR 586, where a relative who paid the funeral expenses of a deceased person whose widow and family lived in China was held entitled to recover from the tortfeasor who caused the death.

2 This includes eg an acceptor of a bill of exchange for honour of the drawer or a shipmaster: *Hawtayne v Bourne* (1841) 7 M & W 595.

3 See eg *Walker v Great Western Rly Co* (1867) LR 2 Exch 228; *Langan v Great Western Rly Co* (1873) 30 LT 173, Ex Ch (general manager and railway police inspector held to have authority to bind railway company for cost of aid to injured passengers); cf *Cox v Midland Counties Rly Co* (1849) 3 Exch 268 (surgeon operating on injured passenger of railway not entitled to recover cost from railway company although surgeon acting at request of doctor normally employed on railway); see also *Great Northern Rly Co v Swaffield* (1874) LR 9 Exch 132 (carriers of a horse, finding no one to receive it at the destination, maintained it from 'common humanity' and could recover cost of doing so).

4 See eg *Bazeley v Forder* (1868) LR 3 QB 559; *JN Nabarro & Sons v Kennedy* [1955] 1 QB 575, [1954] 2 All ER 605. This right was abrogated by the Matrimonial Proceedings and Property Act 1970 s 41(1) (repealed by the Matrimonial Causes Act 1973 but without reviving the former agency of necessity). Where a husband and wife live together, this used to give rise to a presumption that the wife had authority to pledge her husband's credit (*Debenham v Mellon* (1860) 6 App Cas 24, HL), although it is doubtful whether this is so at the present day. As to a wife's authority to contract on behalf of her husband or to pledge his credit see further **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARAS 256-273.

5 *Sims & Co v Midland Rly Co* [1913] 1 KB 103; *Springer v Great Western Rly Co* [1921] 1 KB 257, CA. As to the authority of a shipmaster to sell the ship or cargo see **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 440 et seq. See also *John Koch Ltd v C and H Products Ltd* [1956] 2 Lloyd's Rep 59, CA, where the possibility of communication with the principal precluded an agency of necessity in respect of perishables.

6 See *Surrey Breakdown Ltd v Knight* [1999] RTR 84, CA (the removal of a stolen car from a pond on the instruction of the police was not a pressing emergency compelling intervention without the owner's authority).

7 *The Bonita, The Charlotte* (1861) 5 LT 141 (sale of ship by master); *The Gratitude* (1801) 3 Ch Rob 240; *Benson v Duncan* (1849) 3 Exch 644; *Gibbs v Grey* (1857) 2 H & N 22 (payment of freight by master on reshipment of cargo); and see **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 440 et seq.

8 *Sachs v Miklos* [1948] 2 KB 23, [1948] 1 All ER 67, CA; *Munro v Willmott* [1949] 1 KB 295, [1948] 2 All ER 983. There is, however, a statutory right of sale in certain circumstances after the service of notice: see **BAILMENT** vol 3(1) (2005 Reissue) PARA 80.

9 *Springer v Great Western Rly Co* [1921] 1 KB 257, CA; *Prager v Blatspiel, Stamp and Heacock Ltd* [1924] 1 KB 566; *John Koch Ltd v C and H Products Ltd* [1956] 2 Lloyd's Rep 59, CA; *Dimurro v Charles Caplin & Co* (1969) 211 Estates Gazette 31.

10 *Sims & Co v Midland Rly Co* [1913] 1 KB 103; *Atlantic Mutual Insurance Co Ltd v Huth* (1880) 16 ChD 474, CA; and see the cases cited in note 9.

11 *Tronson v Dent* (1853) 8 Moo PCC 419; *Prager v Blatspiel, Stamp and Heacock Ltd* [1924] 1 KB 566.

12 *The Australia* (1859) 13 Moo PCC 132. It is not necessary that the ship should be absolutely beyond repair to entitle a master to sell, the question being whether it was prudent to incur so large an expense; cf *The Mariposa* [1896] P 273 (as to whether the shipmaster was acting as agent for the ship or the passengers).

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/1. NATURE AND FORMATION/(4) FORMATION OF AGENCY/(iv) Agency by Estoppel/25. Agency by estoppel.

## (iv) Agency by Estoppel

### 25. Agency by estoppel.

Agency by estoppel<sup>1</sup> arises where one person has so acted<sup>2</sup> as to lead another to believe that he has authorised a third person to act on his behalf, and that other in such belief<sup>3</sup> enters into transactions with the third person within the scope of such ostensible authority<sup>4</sup>. In this case the first-mentioned person is estopped from denying the fact of the third person's agency under the general law of estoppel, and it is immaterial whether the ostensible agent had no authority whatever in fact<sup>5</sup>, or merely acted in excess of his actual authority<sup>6</sup>. The principal cannot set up a private limitation upon the agent's actual authority so as to reduce the ostensible authority<sup>7</sup>, for, so far as third persons are concerned, the ostensible authority is the sole test of his liability<sup>8</sup>. If, however, the agent is held out as having only a limited authority to do, on behalf of his principal, acts of a particular class, the principal is not bound by an act outside that authority even though it is an act of that particular class<sup>9</sup>. The onus lies upon the person dealing with the agent to prove either real or ostensible authority<sup>10</sup>, and it is a matter of fact in each case whether ostensible authority existed for the particular act for which it is sought to make the principal liable<sup>11</sup>. Holding out is something more than estoppel by negligence; it is necessary to prove affirmatively conduct amounting to holding out<sup>12</sup>. No representation made solely by the agent as to the extent of his authority can amount to a holding out by the principal<sup>13</sup>.

A person who assumes to act as an agent is estopped, as between himself and the person on whose behalf he professed to act, from denying the agency<sup>14</sup>.

1 The doctrine of 'holding out', also known as apparent or ostensible authority, has been said to be based on estoppel: *Rama Corpn Ltd v Proved Tin and General Investments Ltd* [1952] 2 QB 147, [1952] 1 All ER 554; *Freeman and Lockyer (a firm) v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480, [1964] 1 All ER 630, CA. Where, however, a good title to goods is passed under an apparent authority, the rule is not based on estoppel but on apparent authority as an exception, evolved by the courts for mercantile convenience, to the rule *nemo dat quod non habet*: see *Eastern Distributors Ltd v Goldring (Murphy, third party)* [1957] 2 QB 600, [1957] 2 All ER 525, CA; and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARAS 151, 157. As to estoppel generally see **ESTOPPEL** vol 16(2) (Reissue) PARA 951 et seq.

2 The holding out may be by acts of the principal (see *Hazard v Treadwell* (1722) 1 Stra 506; *Summers v Solomon* (1857) 26 LJQB 301; *Jetley v Hill* (1884) Cab & El 239; *Filmer v Lynn* (1835) 4 Nev & MKB 559; *Mahony v East Holyford Mining Co* (1875) LR 7 HL 869; *Barrett v Deere* (1828) Mood & M 200; *Trueman v Loder* (1840) 11 Ad & El 589; *Barrett v Irvine* [1907] 2 IR 462, CA; *F Mildner & Sons v Noble* (1956) Times, 8 March, CA), or by the principal allowing the agent to hold himself out as having authority (see *Re Henry Bentley & Co and Yorkshire Breweries Ltd, ex p Harrison* (1893) 69 LT 204, CA; *Re International Contract Co, Levita's Case* (1870) 5 Ch App 489; *London Freehold and Leasehold Property Co v Suffield* [1897] 2 Ch 608, CA; *Fuller v Glyn, Mills, Currie & Co* [1914] 2 KB 168; *Wood v Clydesdale Bank Ltd* 1914 SC 397, Ct of Sess; *Bailey and Whites Ltd v House* (1915) 31 TLR 583, DC; *Soanes v London and South Western Rly Co* (1919) 88 LJBK 524, CA; *Australian Bank of Commerce Ltd v Perel* [1926] AC 737, PC; *Ashford Shire Council v Dependable Motors Pty Ltd* [1961] AC 336, [1961] 1 All ER 96, PC). Cf *Discount Kitchens v Crawford* (1988) Times, 5 December, CA; *Hector v Lyons* (1988) 58 P & CR, (1988) Times, 19 December, CA; *Charrington Fuel Oil Ltd v Parvant Co Ltd* (1988) Times, 28 December.

A mere failure by a principal to detect irregularities in transactions by the agent will not by itself amount to a holding out for future transactions even where the failure is caused by negligence: see *Lloyds Bank Ltd v Chartered Bank of India, Australia and China* [1929] 1 KB 40, CA; *Bank of Ireland v Evans' Charities Trustees in Ireland* (1885) 5 HL Cas 389; *Swan v North British Australasian Co* (1863) 2 H & C 175. Cf *Morison v London County and Westminster Bank Ltd* [1914] 3 KB 356, CA.

3 *MacFisheries Ltd v Harrison* (1924) 93 LJBK 811.

4 *Summers v Solomon* (1857) 26 LJQB 301; and see *Biggs v Evans* [1894] 1 QB 88; *Dickinson v Valpy* (1829) 10 B & C 128; *Farquharson Bros & Co v C King & Co* [1902] AC 325, HL; *St Margaret's Trust Ltd v Byrne* (1976) Times, 23 January, CA. A thief who shows a stolen indorsed receipt to a bank and thereon receives payment of money which a customer had directed the bank to pay to the customer's brother on showing the receipt is not an agent by estoppel although the brother was not known to the bank: *Wood v Clydesdale Bank Ltd* 1914 SC 397, Ct of Sess. An agreement between two persons that one should occupy a position that could only be lawfully occupied by the other does not create an agency by estoppel: *MacFisheries Ltd v Harrison* (1924) 93 LJBK 811.

5 *Pickard v Sears* (1837) 6 Ad & El 469; *Freeman v Cooke* (1848) 2 Exch 654; *Muir's Executors v Craig's Trustees* 1913 SC 349, Ct of Sess; *Povey v Taylor* (1966) 116 NLJ 1656, CA.

6 *Union Credit Bank Ltd v Mersey Docks and Harbour Board* [1899] 2 QB 205; *King v Smith* [1900] 2 Ch 425; *Little v Spreadbury* [1910] 2 KB 658, DC; *Eastern Distributors Ltd v Goldring (Murphy, third party)* [1957] 2 QB 600, [1957] 2 All ER 525, CA.

7 *Hawken v Bourne* (1841) 8 M & W 703; and see *Maddick v Marshall* (1864) 17 CBNS 829, Ex Ch; *Riley v Packington* (1867) LR 2 CP 536; *Robinson v Mollett* (1875) LR 7 HL 802.

8 *Pickering v Busk* (1812) 15 East 38. This applies even where the agent is acting for his own benefit and in fraud of the principal: *Hambro v Burnand* [1904] 2 KB 10, CA.

9 *Grant v Norway* (1851) 10 CB 665; *Chapleo v Brunswick Permanent Benefit Building Society* (1881) 6 QBD 696, CA; *George Whitechurch Ltd v Cavanagh* [1902] AC 117, HL; *Ruben v Great Fingall Consolidated* [1906] AC 439, HL; *Russo-Chinese Bank v Li Yau Sam* [1910] AC 174, PC; *A-G for Ceylon v Silva* [1953] AC 461, [1953] 2 WLR 1185, PC; *Armagas Ltd v Mundogas SA, The Ocean Frost* [1986] AC 717, [1986] 2 All ER 385, HL.

10 *Pole v Leask* (1863) 33 LJ Ch 155, HL.

11 *Brazier v Camp* (1894) 63 LJQB 257, CA; *Dyer v Pearson* (1824) 4 Dow & Ry KB 648; *Young v Cole* (1837) 3 Bing NC 724. See also *Soanes v London and South Western Rly Co* (1919) 88 LJBK 524, CA (authority of railway porter in uniform); *Leckenby v Wolman* [1921] WN 100 (authority of furniture salesman to take back furniture); *Bocking Garage v Mazurk* (1954) Times, 4 February, CA (authority of man behind counter to take money); *Cleveland Manufacturing Co Ltd v Muslim Commercial Bank Ltd* [1981] 2 Lloyd's Rep 646 (lack of authority of forwarding agent to indorse sight draft).

12 *Bailey and Whites Ltd v House* (1915) 31 TLR 583, DC; *Howard v Carline* (1956) 7 DLR (2d) 324, BC CA. The borderline between negligence and conduct amounting to holding out is narrow: *F Mildner & Sons v Noble* (1956) Times, 8 March, CA; *Povey v Taylor* (1966) 116 NLJ 1656, CA.

13 *A-G for Ceylon v Silva* [1953] AC 461, [1953] 2 WLR 1185, PC.

14 *Moore v Peachey* (1891) 7 TLR 748; *Roberts v Ogilby* (1821) 9 Price 269; *V/O Rasnoimport v Guthrie & Co Ltd* [1966] 1 Lloyd's Rep 1. As to the personal liability of one who purports to contract on behalf of a company not yet formed see the Companies Act 1985 s 36C; and **COMPANIES** vol 14 (2009) PARA 66.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/1. NATURE AND FORMATION/(4) FORMATION OF AGENCY/(iv) Agency by Estoppel/26. Equitable agency.

## 26. Equitable agency.

The circumstances in which a creditor is answerable for inequitable conduct on the part of a debtor are not limited to those when the debtor is the creditor's agent in the common law sense<sup>1</sup>. The creditor can be visited with the consequences of the debtor's conduct even where the debtor was neither actually nor ostensibly authorised to act as he did, thus giving rise to what may be termed an 'equitable agency'<sup>2</sup>.

1 See *Barclays Bank v O'Brien* [1993] QB 109, [1992] 4 All ER 983, CA (affd on other grounds [1994] 1 AC 180, [1993] 4 All ER 417, HL) (the bank agreed an overdraft facility with its customer on condition, inter alia, that a legal charge over the matrimonial home was provided by his wife as well as himself; no warning was given to the wife that she should take independent legal advice before signing, and the husband misrepresented to her the extent of the charge).

2 See *Barclays Bank v O'Brien* [1993] QB 109, [1992] 4 All ER 983, CA (affd on other grounds [1994] 1 AC 180, [1993] 4 All ER 417, HL). See also *Bank of Credit & Commerce International SA v Aboody* [1990] 1 QB 923, [1992] 4 All ER 955, CA (overruled on other grounds by *CIBC Mortgages plc v Pitt* [1994] 1 AC 200, [1993] 4 All ER 433, HL).

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/1. NATURE AND FORMATION/(4) FORMATION OF AGENCY/(v) Co-principals and Co-agents/27. Co-principals.

## (v) Co-principals and Co-agents

### 27. Co-principals.

Co-principals may jointly appoint an agent to act for them, and in such case become jointly liable to him<sup>1</sup>, and may jointly sue him<sup>2</sup>. The agent is not bound to account separately to one of several co-principals<sup>3</sup>, and, if he has done so, is not, apart from special stipulation, thereby discharged from liability to the other or others<sup>4</sup> unless the co-principals are also partners<sup>5</sup>.

1 *Keay v Fenwick* (1876) 1 CPD 745, CA. One co-principal may ratify the acts of an agent, for example a sale, without ratifying the appointment of the agent, and may therefore not be liable for a share of the commission payable to the agent: see *Hughes v Hughes* (1971) 115 Sol Jo 911, CA.

2 *Skinner v Stocks* (1821) 4 B & Ald 437; *Cothay v Fennell* (1830) 10 B & C 671; *Jones v Cuthbertson* (1873) LR 8 QB 504.

3 *Hatsall v Griffith* (1834) 2 Cr & M 679.

4 *Innes v Stephenson* (1831) 1 Mood & R 145; *Lee v Sankey* (1873) LR 15 Eq 204.

5 *Innes v Stephenson* (1831) 1 Mood & R 145; and see *Heath v Chilton* (1844) 12 M & W 632. As to the implied authority of a partner to release debts owed to a firm see eg *Furnival v Weston* (1822) 7 Moore CP 356; and **PARTNERSHIP** vol 79 (2008) PARA 55.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/1. NATURE AND FORMATION/(4) FORMATION OF AGENCY/(v) Co-principals and Co-agents/28. Co-agents.



## 28. Co-agents.

A principal may give authority to co-agents to act for him, either jointly, or jointly and severally. A mere authority to act, without further specification, is a joint authority<sup>1</sup>, and can be acted upon only by the co-agents jointly<sup>2</sup>; but an authority given jointly and severally may be acted upon by all or any of the co-agents so as to bind the principal<sup>3</sup>.

A principal may also appoint co-agents, giving power to a quorum to act on his behalf. This is normally the position as between a registered company and its directors<sup>4</sup>. In such case the principal will not be bound by the act of any number less than the appointed quorum<sup>5</sup>.

Where a power of a public nature is committed to several persons, in the absence of statutory provision or implication to the contrary the act of the majority is binding upon the minority<sup>6</sup>.

One co-agent is not liable for the act of another unless he has expressly authorised or tacitly permitted it<sup>7</sup>, or the co-agents are partners<sup>8</sup>.

1 *Brown v Andrew* (1849) 18 LJQB 153.

2 *Brown v Andrew* (1849) 18 LJQB 153; and see also *Boyd v Durand* (1809) 2 Taunt 161 (warrant issued to four bailiffs jointly and not severally held not to authorise an arrest by one); *Bell v Nixon* (1832) 9 Bing 393 (two persons filling office of clerk to turnpike trustees must both join in executing a contract on behalf of the trustees).

3 *Guthrie v Armstrong* (1822) 5 B & Ald 628. For the statutory form of power of attorney, which provides for joint and several authority, see PARA 30.

4 See eg *Ridley v Plymouth Grinding and Baking Co* (1848) 2 Exch 711; and see the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule Table A, regs 70, 89; and **COMPANIES** vol 14 (2009) PARAS 529, 541.

5 *Kirk v Bell* (1851) 16 QBD 290; *D'Arcy v Tamar, Kit Hill and Callington Rly Co* (1867) LR 2 Exch 158; and see *Re Liverpool Household Stores Association Ltd* (1890) 59 LJ Ch 616; *Brown v Andrew* (1849) 18 LJQB 153. The principal would, however, be bound if it were to be held, in construing what is now the Companies Act 1985 s 35A (see PARA 8; and **COMPANIES** vol 14 (2009) PARA 263), that a matter decided on by less than a quorum is nonetheless 'decided on by the directors' within the meaning of that provision.

6 *Grindley v Barker* (1798) 1 Bos & P 229. See the Report of the Judicial Committee of the Privy Council on questions submitted in connection with the Irish Boundary Commission (1924) 59 LJo 517. See also *Atkinson v Brown* [1963] NZLR 755, NZ CA; *Picea Holdings Ltd v London Rent Assessment Panel* [1971] 2 QB 216, [1971] 2 All ER 805, DC.

7 This rule is chiefly exemplified in the case of the acts of one or more directors of a company without the knowledge of the others, and extends to fraudulent acts: *Cargill v Bower* (1878) 10 ChD 502; *Re Denham & Co* (1883) 25 ChD 752; *Re Montrotier Asphalte Co, Perry's Case* (1876) 34 LT 716; *Lucas v Fitzgerald* (1903) 20 TLR 16; *Bear v Stevenson* (1874) 30 LT 177, PC; *Land Credit Co of Ireland v Lord Fermoy* (1870) 5 Ch App 763; *Weir v Bell* (1878) 3 ExD 238, CA; *Cullerne v London and Suburban General Permanent Building Society* (1890) 25 QBD 485, CA.

8 See the Partnership Act 1890 s 6; and **PARTNERSHIP** vol 79 (2008) PARA 58.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/2. AUTHORITY OF THE AGENT/(1) DERIVATION AND EXTENT/29. Derivation of authority.

## 2. AUTHORITY OF THE AGENT

### (1) DERIVATION AND EXTENT

#### 29. Derivation of authority.

As has been previously stated<sup>1</sup>, the authority of the agent may be derived expressly from an instrument, either a deed or simply in writing, or may be conferred orally. Authority may also be implied from the conduct of the parties or from the nature of the employment<sup>2</sup>. It may in certain cases be due to the necessity of circumstances<sup>3</sup>, and in others be conferred by a valid ratification subsequent to the actual performance<sup>4</sup>. In addition, a person may appear to have given authority to another, and acts within such apparent authority may effectively bind him to the third party<sup>5</sup>.

There would also, in certain circumstances, appear to be the possibility that the court will imply an equitable agency where no agency exists at common law<sup>6</sup>.

1 See PARA 14 et seq.

2 See PARAS 37-44.

3 See PARA 24.

4 See PARAS 57-70.

5 Such authority may create an agency relationship where none already exists, or it may extend an existing relationship: *Swiss Air Transport Co Ltd v Palmer* [1976] 2 Lloyd's Rep 604; see further, as to the doctrine of ostensible authority PARA 25.

'This type of apparent authority is often described as the usual authority of an agent. But it is important to remember that the idea of usual authority is used in two senses. First, it sometimes means that the agent had implied actual authority to perform acts necessarily incidental to the performance of the agency. Secondly, it sometimes means that the principal's conduct in clothing the agent with the trappings of authority was such as to induce a third party to rely on the existence of the agency': *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] BCLC 1409 at 1417, [1993] 2 Lloyd's Rep 194 at 201, CA, per Steyn LJ.

6 See PARA 26.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/2. AUTHORITY OF THE AGENT/(1) DERIVATION AND EXTENT/30. Extent of authority.

### **30. Extent of authority.**

The authority of an agent may be confined to a particular act or be general<sup>1</sup> in its character. It will extend not only to acts expressly authorised but also to subordinate acts which are necessary or ordinarily incidental to the exercise of the express authority<sup>2</sup> and to acts within the agent's ostensible authority<sup>3</sup>. In no case, however, can the authority of the agent exceed the power of the principal to act on his own behalf<sup>4</sup>. As between the agent and his principal, an agent's authority may be limited by agreement or special instructions, but, as regards third persons, the authority which the agent has is that which he is reasonably believed to have, having regard to all the circumstances, and which is reasonably to be gathered from the nature of his employment and duties<sup>5</sup>.

Where the agency is created by a general power of attorney in statutory form<sup>6</sup>, the power will operate to confer upon the agent or agents authority to do anything which the donor can lawfully do by an attorney<sup>7</sup>, other than functions which the donor has as a trustee, personal representative, tenant for life or statutory owner<sup>8</sup>.

1 See PARA 11.

2 See PARA 33.

3 See PARA 25.

4 *Shrewsbury and Birmingham Rly Co v North Western Rly Co* (1857) 6 HL Cas 113; *Montreal Assurance Co v M'Gillivray* (1859) 13 Moo PCC 87; *Ashbury Railway Carriage and Iron Co v Riche* (1875) LR 7 HL 653.

Corporations and incorporated companies can only enter into contracts within the powers of their charter, memorandum of association or Act of Parliament. However, the validity of an act done by a company must not be called into question on the ground of lack of capacity by reason of anything in the company's memorandum: see the Companies Act 1985 s 35(1); and **COMPANIES** vol 14 (2009) PARA 265. The operation of this provision is limited by the Charities Act 1993 s 65 in relation to companies which are charities, and the Companies Act 1985 s 322A which deals with the invalidity of certain transactions involving directors etc, has effect as provided in the Charities Act 1993 s 65. A party to a transaction with a company is not bound to inquire as to whether it is permitted by the company's memorandum or as to any limitation on the powers of the board of directors to bind the company or authorise others to do so: see the Companies Act 1985 s 35B; PARA 8; and **COMPANIES** vol 14 (2009) PARA 263.

Note that, as from a day to be appointed, the Companies Act 1985 is repealed and replaced by the Companies Act 2006: at the date at which this volume states the law no such day had been appointed.

5 *Brady v Todd* (1861) 9 CBNS 592 (a servant sent to deliver a horse has no implied authority to warrant it, and the person to whom it is delivered takes it at the risk that the servant had no authority in fact). As to the apparent and implied authority of the agent see PARAS 25, 37-44.

6 See the Powers of Attorney Act 1971 s 10(1), Sch 1. The statutory form provides for the appointment of either one or two attorneys, jointly or jointly and severally. Any form to the like effect but expressed to be made under the Powers of Attorney Act 1971 will confer the same authority as the statutory form: see s 10(1). A general power under s 10 does not empower its donee to transfer trust property: *Walia v Michael Naughton Ltd* [1985] 3 All ER 673, [1985] 1 WLR 1115. A Welsh language form is prescribed by the Powers of Attorney (Welsh Language Forms) Order 2000, SI 2000/215, art 3, Schedule Pt II.

7 Powers of Attorney Act 1971 s 10(1). This does not confer a right to conduct litigation where the attorney would not otherwise have that right: see *Gregory v Turner; R (on the application of Morris) v North Somerset Council* [2003] EWCA Civ 183, [2003] 2 All ER 1114, [2003] 1 WLR 1149. As to the acts a donor of a power may lawfully do by an attorney see PARA 15.

8 Powers of Attorney Act 1971 s 10(2) (amended by the Trustee Delegation Act 1999 s 3). This is now subject to the Trustee Delegation Act 1999 s 1 (see **TRUSTS** vol 48 (2007 Reissue) PARA 985): Powers of Attorney Act 1971 s 10(2) (as so amended).

## UPDATE

### 30 Extent of authority

NOTE 4--Charities Act 1993 s 65 omitted: SI 2009/1941.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/2. AUTHORITY OF THE AGENT/ (2) CONSTRUCTION OF AUTHORITY/(i) Powers of Attorney/31. Strict construction.

## (2) CONSTRUCTION OF AUTHORITY

### (i) Powers of Attorney

#### 31. Strict construction.

An instrument conferring authority by deed is termed a power of attorney<sup>1</sup>. The person conferring the authority is termed the donor of the power, and the recipient of the authority, the donee. A power of attorney is construed strictly by the courts, according to well-recognised rules<sup>2</sup>, regard first being had to any recitals which, showing the general object, control the general terms in the operative part of the deed<sup>3</sup>.

General words used in conferring the power are construed as limited by reference to the special powers conferred<sup>4</sup>, but incidental powers necessary for carrying out the authority will be implied<sup>5</sup>. Thus a power granted to the donee to manage certain property, followed by general words giving him full power to do all lawful acts relating to the donor's business and affairs, of what nature or kind soever, does not necessarily include authority to indorse bills, for the general words are construed as having reference to managing the donor's property, for which indorsing bills may not be incidental or necessary<sup>6</sup>. A power to complete all contracts which the donee may deem necessary for a specific object, however, includes authority to obtain money for payment in respect of such contracts, where the payment is necessary and incidental to the completion<sup>7</sup>.

1 See PARA 16.

2 *Bryant, Powis and Bryant Ltd v La Banque du Peuple* [1893] AC 170, PC; *Howard v Baillie* (1796) 2 Hy Bl 618; *Withington v Herring* (1829) 5 Bing 442.

3 *Rooke v Lord Kensington* (1856) 2 K & J 753; *Danby v Coutts & Co* (1885) 29 ChD 500.

4 *Attwood v Munnings* (1827) 7 B & C 278; *Perry v Holl* (1860) 2 De GF & J 38; *Lewis v Ramsdale* (1886) 55 LT 179.

5 *Re Wallace, ex p Wallace* (1884) 14 QBD 22, CA, where a solicitor authorised to conduct legal proceedings was held justified in presenting a bankruptcy petition; but he is not justified in assenting to the execution by the defendant of a deed of assignment for the benefit of his creditors: *Re A Debtor (No 1 of 1914), ex p Debtor v Petitioning Creditor* [1914] 2 KB 758.

6 *Esdaille v La Nauze* (1835) 1 Y & C Ex 394; cf *Harper v Godsell* (1870) LR 5 QB 422 (general words limited to exercise of privileges under a partnership); and see *Lewis v Ramsdale* (1886) 55 LT 179.

7 *Withington v Herring* (1829) 5 Bing 442; and see *Henley v Soper* (1828) 8 B & C 16 (authority to dissolve partnership and appoint any other person the donee might see fit includes authority to submit the accounts to arbitration).

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/2. AUTHORITY OF THE AGENT/ (2) CONSTRUCTION OF AUTHORITY/(i) Powers of Attorney/32. Limits of authority to be observed.

### **32. Limits of authority to be observed.**

There must be strict adherence to the authority conferred by power of attorney. If the agent in the pretended exercise of his authority acts in excess of and outside the reasonable scope of its special powers, the third party will be unable to make the principal liable<sup>1</sup>. Thus, where an instrument gives authority to sign contracts, acceptances and other documents, it gives power to sell or purchase negotiable instruments, but it does not give power to pledge them<sup>2</sup>. Similarly, a power to draw cheques extends only to drawing cheques in relation to the principal's affairs<sup>3</sup>. A signature by procuration to a negotiable instrument operates as notice that the agent has only a limited authority to sign and the principal is bound by such signature only if the agent in so signing was in fact acting within the limits of his authority<sup>4</sup>. Such notice operates as and when the document is negotiated or delivered<sup>5</sup>.

1 *Jacobs v Morris* [1902] 1 Ch 816, CA, where a loan to the agent was made without inquiry, and, as he had no general borrowing powers, it was held not within his authority to bind his principal.

2 *Jonmenjoy Coondoo v Watson* (1884) 9 App Cas 561, PC; *De Bouchout v Goldsmid* (1800) 5 Ves 211.

3 *Reckitt v Barnett, Pembroke and Slater Ltd* [1929] AC 176, HL (payee, aware that cheque had been drawn in payment of attorney's private debt, was obliged to refund).

4 See the Bills of Exchange Act 1882 s 25; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1474.

5 *Midland Bank Ltd v Reckitt* [1933] AC 1, HL.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/2. AUTHORITY OF THE AGENT/ (2) CONSTRUCTION OF AUTHORITY/(i) Powers of Attorney/33. Examples of incidental powers implied.

### 33. Examples of incidental powers implied.

The construction of authorities given by powers of attorney has given rise to a multiplicity of cases, of which the following are examples, which serve to indicate the extent to which the court, following its strict rules of construction, will allow actual expressions to imply incidental powers.

A power to deal with land gives authority to sell, the conditions of sale depending on the wording of the authority<sup>1</sup>, but not to sell that portion included in a voluntary settlement<sup>2</sup>. A general power gives authority to instruct a solicitor<sup>3</sup>, to sue<sup>4</sup>, and to submit to arbitration<sup>5</sup>; but, when given to act in partnership matters, it does not give authority to dissolve the partnership<sup>6</sup>. A power to sell land belonging to the donor does not give authority to exercise a power of sale vested in the donor as a mortgagee<sup>7</sup>; a general power to mortgage, sell, or otherwise deal with an estate does not authorise the donee to execute a deed as a voluntary gift<sup>8</sup>; and a power to mortgage does not enable an attorney to execute a mortgage of the principal's property to secure an existing debt of the principal<sup>9</sup>.

A power given by an executrix to receive debts due to her as executrix does not authorise the donee to bind the donor by accepting bills of exchange on her account<sup>10</sup>; a power to sue for debts and conduct the business of the principal does not give authority to indorse bills of exchange in his name<sup>11</sup>, nor does a power to demand, sue for, recover and receive moneys by all lawful ways and means whatsoever give such an authority<sup>12</sup>; but the words 'to sell, indorse and assign' authorise the indorsement of bills of exchange in the name of the donor<sup>13</sup>. A power to draw cheques 'without restriction' does not give the donee authority to draw cheques for the payment of his private debts<sup>14</sup>. An authority to discount a bill includes authority to warrant it<sup>15</sup>. A shipmaster's authority may be sufficient to empower him to assign the passage money of the ship<sup>16</sup> or to enter into a charterparty<sup>17</sup>; and a ship agent's authority may enable him to dismiss the captain<sup>18</sup>. A clause by which the principal ratifies 'whatsoever the attorney shall do or purports to do' under the instrument does not extend the actual authority given by the power of attorney<sup>19</sup>.

1 *Hawksley v Outram* [1892] 3 Ch 359, CA.

2 *General Meat Supply Association Ltd v Bouffler* (1879) 41 LT 719, CA.

3 *Re Frampton, ex p Frampton* (1859) 1 De GF & J 263, CA.

4 *Gray v Pearson* (1870) LR 5 CP 568.

5 *Henley v Soper* (1828) 8 B & C 16; and see *Goodson v Brooke* (1815) 4 Camp 163.

6 *Harper v Godsell* (1870) LR 5 QB 422.

7 *Re Dowson and Jenkins's Contract* [1904] 2 Ch 219, CA. As to land vested in the donor as trustee for sale upon the statutory trusts see *Green v Whitehead* [1930] 1 Ch 38, CA.

- 8 *Re Bowles' Mortgage Trust* (1874) 31 LT 365, CA.
- 9 *Re Bowles' Mortgage Trust* (1874) 31 LT 365, CA.
- 10 *Gardner v Baillie* (1796) 6 Term Rep 591; cf *Howard v Baillie* (1796) 2 Hy BI 618.
- 11 *Esdaile v La Nauze* (1835) 1 Y & C Ex 394; *Murray v East India Co* (1821) 5 B & Ald 204; *Hogg v Snaith* (1808) 1 Taunt 347.
- 12 *Murray v East India Co* (1821) 5 B & Ald 204.
- 13 *Bank of Bengal v Macleod* (1849) 5 Moo Ind App 1, PC; *Bank of Bengal v Fagan* (1849) 5 Moo Ind App 27, PC.
- 14 *Reckitt v Barnett, Pembroke and Slater Ltd* [1929] AC 176, HL.
- 15 *Fenn v Harrison* (1791) 4 Term Rep 177.
- 16 *Willis v Palmer* (1859) 7 CBNS 340.
- 17 *Routh v Macmillan* (1863) 2 H & C 750.
- 18 *Berwick v Horsfall* (1858) 4 CBNS 450.
- 19 *Midland Bank Ltd v Reckitt* [1933] AC 1, HL.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/2. AUTHORITY OF THE AGENT/ (2) CONSTRUCTION OF AUTHORITY/(ii) Written Authority/34. Interpretation of authority under hand.

## **(ii) Written Authority**

### **34. Interpretation of authority under hand.**

A written authority is capable of extension either orally or by conduct<sup>1</sup>. Such an authority is not so strictly construed as one by deed, and regard is had to all the circumstances of the agency business<sup>2</sup>. The ordinary full authority given in one part of the instrument will not be cut down because there are ambiguous and uncertain expressions elsewhere<sup>3</sup>; but the document will be considered as a whole for the interpretation of particular words or directions<sup>4</sup>. When once an authority has been reduced into writing, the interpretation of the written document is, in general, a matter of law and not a question of fact<sup>5</sup>.

- 1 *Pole v Leask* (1860) 28 Beav 562; affd (1863) 33 LJ Ch 155, HL.
- 2 *Pole v Leask* (1860) 28 Beav 562; affd (1863) 33 LJ Ch 155, HL.
- 3 *Pariente v Lubbock* (1856) 8 De GM & G 5.
- 4 See eg *Entwisle v Dent* (1848) 1 Exch 812, where 'may' was interpreted as being directory.
- 5 See eg *Re L Sutro & Co and Heilbut Symons & Co* [1917] 2 KB 348, CA; and **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 185.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/2. AUTHORITY OF THE AGENT/ (2) CONSTRUCTION OF AUTHORITY/(ii) Written Authority/35. Agent's discretion.

### 35. Agent's discretion.

In the absence of express directions, the agent may exercise his discretion so as to act in the best manner possible for his principal<sup>1</sup>. An agent whose instructions are in ambiguous terms may be justified if he acts in good faith and places a reasonable construction on his authority<sup>2</sup>, but where the limits imposed are definite, he has no right to exercise a discretion<sup>3</sup>.

<sup>1</sup> *Wolff v Horncastle* (1798) 1 Bos & P 316; *Pariente v Lubbock* (1856) 8 De GM & G 5. See also *Tallentire v Ayre* (1884) 1 TLR 143, CA.

<sup>2</sup> *Ireland v Livingston* (1872) LR 5 HL 395; *Boden v French* (1851) 10 CB 886; *Johnston v Kershaw* (1867) LR 2 Exch 82; *Miles v Haslehurst & Co* (1906) 23 TLR 142; *Cobridge Steamship Co Ltd v Bucknall Steamship Lines Ltd* (1910) 15 Com Cas 138, CA; *S Weigall & Co v Runciman & Co* (1916) 85 LJB 1187, CA; *Gould v South Eastern and Chatham Rly Co* [1920] 2 KB 186, DC; *James Vale & Co v Van Oppen & Co Ltd* (1921) 37 TLR 367; *Finn v Shelton Iron, Steel and Coal Co Ltd* (1924) 131 LT 213, CA; *Westminster Bank Ltd v Hilton* (1926) 136 LT 315. Where, because of modern communications, an agent can easily resolve a patent ambiguity by communicating with his principal, it may be that he has a duty to do so, and early cases should probably be considered in this light. Quære if an agent acting in good faith fails to spot ambiguity. As to the authority for an estate agent to make a contract for the sale of land see PARA 41.

<sup>3</sup> *Bertram, Armstrong & Co v Godfray* (1830) 1 Knapp 381, PC.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/2. AUTHORITY OF THE AGENT/ (2) CONSTRUCTION OF AUTHORITY/(iii) Oral Authority/36. Oral authority given in general terms.

### (iii) Oral Authority

#### 36. Oral authority given in general terms.

When authority is given orally, its terms and extent are questions of fact, depending on the circumstances of the particular case and the usages of the profession, trade or business<sup>1</sup>. An authority conferred in general terms gives an agent power to act in the ordinary way in reference to the particular business, and to do subordinate acts<sup>2</sup>, and all reasonable acts in relation to the business<sup>3</sup>, but does not, in the absence of special conditions, give authority to take more than the usual risks or employ extraordinary means<sup>4</sup>.

<sup>1</sup> As to custom and usage see generally PARA 44.

<sup>2</sup> *Collen v Gardner* (1856) 21 Beav 540.

<sup>3</sup> *Wiltshire v Sims* (1808) 1 Camp 258; *East India Co v Hensley* (1794) 1 Esp 111; *Howard v Braithwaite* (1812) 1 Ves & B 202.

<sup>4</sup> *Papé v Westacott* [1894] 1 QB 272, CA; *Hine Bros v Steamship Insurance Syndicate Ltd, The Netherholme, Glen Holme and Rydal Holme* (1895) 72 LT 79; *Underwood v Nicholls* (1855) 17 CB 239; *Re Williams, ex p Howell* (1865) 12 LT 785, CA; *Blumberg v Life Interests and Reversionary Securities Corp Ltd* [1897] 1 Ch 171 (affd [1898] 1 Ch 27, CA). The authority to receive money is to receive in cash and not by set-off, nor, in the absence of special custom, by bill of exchange or cheque: see PARA 38.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/2. AUTHORITY OF THE AGENT/(3) IMPLIED AUTHORITY/37. Necessary and incidental acts.

### (3) IMPLIED AUTHORITY

#### 37. Necessary and incidental acts.

The implied authority of an agent extends to all subordinate acts which are necessary or ordinarily incidental to the exercise of his express authority<sup>1</sup>. It does not, however, extend to acts which are outside the ordinary course of his business, or which are neither necessary nor incidental to his express authority<sup>2</sup>.

The manager of a business has authority to do all acts necessary to the regular conduct of the business<sup>3</sup>, but he has no implied authority to borrow money<sup>4</sup>. A servant has not, merely from the fact of service, authority to pledge his master's credit<sup>5</sup>, but an agent has been held, in particular instances, to have implied authority to pledge his principal's credit<sup>6</sup>.

Authority to act generally (whether conferred by writing or orally) includes authority to instruct a solicitor<sup>7</sup>.

1 *Bayley v Wilkins* (1849) 7 CB 886; *Collen v Gardner* (1856) 21 Beav 540; *Montaignac v Shitta* (1890) 15 App Cas 357, PC; *Financings Ltd v Stimson* [1962] 3 All ER 386, [1962] 1 WLR 1184, CA (implied authority of dealer when acting as agent for hire purchase finance company); *Benmag v Barda* [1955] 2 Lloyd's Rep 354 (implied authority of agent to warrant quality of goods); *Blandy Bros & Co Ltd v Nello Simoni Ltd* [1963] 2 Lloyd's Rep 393, CA (authority of ship's agent to incur loading expenses on charterers' accounts). See also *Wright v Pepin* [1954] 2 All ER 52, [1954] 1 WLR 635 (implied authority of solicitor, instructed to 'clear up' client's affairs, to acknowledge debt for the purposes of the Limitation Act 1939 (repealed: see now the Limitation Act 1980)); *Gavaghan v Edwards* [1961] 2 QB 220, [1961] 2 All ER 477, CA (solicitors acting for both parties already in agreement may have implied authority to make additional memorandum for the purpose of recording a final term agreed by the parties); and *Heatons Transport (St Helens) Ltd v Transport and General Workers Union* [1973] AC 15, [1972] 3 All ER 101, HL (implied authority of shop stewards to act in the interests of members including by industrial action provided acts are not outside union rules or policy).

2 An agent authorised to deliver a horse has no authority to give a warranty (*Woodin v Burford* (1834) 2 Cr & M 391); nor has an agent authorised to sell a horse privately (*Brady v Todd* (1861) 9 CBNS 592), unless he is the agent of a horse dealer (*Howard v Sheward* (1866) LR 2 CP 148; *Bank of Scotland v Watson* (1813) 1 Dow 40; *Baldry v Bates* (1885) 1 TLR 558, DC); but an agent authorised to sell at a fair may give such a warranty (*Brooks v Hassall* (1883) 49 LT 569). An agent to sell a car may have implied authority to give warranties concerning its insurance: *Abrahams v Spitz* (1963) 107 Sol Jo 113, CA. An agent authorised to get a bill discounted may warrant it good, but not indorse it in the principal's name: *Fenn v Harrison* (1790) 3 Term Rep 757; and see *Dingle v Hare* (1859) 7 CBNS 145. The depository of a policy of insurance on a ship at sea has no implied authority to give notice to the underwriter of abandonment as for a total loss: *Jardine v Leathley* (1863) 3 B & S 700. As to the extent of implied authority of a bank manager to advise a customer see *Banbury v Bank of Montreal* [1918] AC 626, HL; and of a solicitor to sign a contract for sale of land see *Blackburn v Walker* (1920) 150 LT Jo 73. A person employed merely to deliver milk has no implied authority to sell (*Whittaker v Forshaw* [1919] 2 KB 419), nor a furniture salesman to cancel a sale (*Leckenby v Wolman* [1921] WN 100), nor, in general, an agent for sale of goods to receive payment (*Butwick v Grant* [1924] 2 KB 483; see further PARA 38). Similarly, a mercantile agent has no authority, implied or statutory, to give goods of his principal to another to pledge for him, even though he may have authority to pledge them himself: see *De Gorter v Attenborough & Son* (1904) 21 TLR 19. As to the statutory protection of third parties dealing with mercantile agents see PARAS 148-149. A managing director of a theatre company has implied authority to refuse admission (*Said v Butt* [1920] 3 KB 497), and an agent for the sale of property has implied authority to sign an open contract (*Keen v Mear* [1920] 2 Ch 574), but not to make conditions as to title (*Keen v Mear*; and see also PARA 41). It is only in very special circumstances that an agent has implied authority to pay his principal's cheques into his own account: *Australia and New Zealand Bank Ltd v Ateliers de Construction Electrique de Charleroi* [1967] 1 AC 86, [1966] 2 WLR 1216, PC.

3 *Hawken v Bourne* (1841) 8 M & W 703. Cf *Rutherford v Ounan* [1913] 2 IR 265. Such acts include the accepting of a bill in the name in which the business is carried on where drawing and accepting bills is incident to the ordinary course of the business: *Edmunds v Bushell and Jones* (1865) LR 1 QB 97; *Watteau v Fenwick* [1893] 1 QB 346; and see PARA 125 note 6. As to the authority of the manager of a public house see *Daun v Simmins* (1879) 41 LT 783, CA. A fraudulent preference of a creditor by the agent entrusted with the financial affairs of a principal who becomes insolvent is the act of the principal: *Re Drabble Bros* [1930] 2 Ch 211, CA. As to the authority of the 'European sales manager' of a property development company see *Kabel v Ronald Lyon Espanola SA* (1968) 208 Estates Gazette 265.



4 *Hawtayne v Bourne* (1841) 7 M & W 595; and see *Dickinson v Valpy* (1829) 10 B & C 128; *Burmester v Norris* (1851) 6 Exch 796. The directors of a banking or trading company, however, have been held to be entitled to borrow for the business of the company: *Re Hamilton's Windsor Ironworks, ex p Pitman and Edwards* (1879) 12 ChD 707; *MacLae v Sutherland* (1854) 3 E & B 1; *Royal British Bank v Turquand* (1855) 5 E & B 248 (affd (1856) 6 E & B 327, Ex Ch).

5 See eg *Wright v Glyn* [1902] 1 KB 745, CA (coachman held not to be an agent to pledge his master's credit for forage).

6 Thus the general manager of a railway company has been held to have authority for credit for medical attendance to a servant of the company: see *Walker v Great Western Rly Co* (1867) LR 2 Exch 228. The position has been held to be otherwise in the case of a stationmaster for medical attendance to an injured passenger: *Cox v Midland Counties Rly Co* (1849) 3 Exch 268. A hospital matron was held to have implied authority to pledge the credit of the managing committee for meat supplied to the hospital: see *Real and Personal Advance Co v Phalempin* (1893) 9 TLR 569, CA.

7 *Re Frampton, ex p Frampton* (1859) 1 De GF & J 263, CA.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/2. AUTHORITY OF THE AGENT/(3) IMPLIED AUTHORITY/38. Authority to receive payment.

### **38. Authority to receive payment.**

Payment made in the ordinary course of business to the agent of the creditor discharges the debt if the agent is authorised or held out as having authority to receive payment<sup>1</sup>. An agent authorised to sell, however, does not necessarily have implied authority to receive payment for his principal<sup>2</sup>. Where it is in the ordinary course of business for the agent to receive payment for his principal, such payment should, generally speaking, be received in cash<sup>3</sup>. Where, however, a cheque taken by the agent has been paid the transaction is equivalent to payment in cash<sup>4</sup>. To restrict the authority of an agent authorised to receive payment to a particular form of payment other than cash, for example by a crossed cheque payable to the principal, there must be plain intimation to the third party<sup>5</sup>. In general an agent has no implied authority to receive payment by cheque<sup>6</sup>, by bill<sup>7</sup>, by other goods<sup>8</sup>, or before it becomes due<sup>9</sup>, nor may he give credit<sup>10</sup>. A reasonable custom to receive payment in any particular mode may, however, be proved<sup>11</sup>.

An authority given to an agent to receive payment does not authorise a settlement of accounts between him and the third party by setting off a debt due from the agent to the third party<sup>12</sup>, unless this can be justified by a known usage which is binding on the principal<sup>13</sup>.

1 See eg *Bridges v Garrett* (1870) LR 5 CP 451, Ex Ch. See also *Bocking Garage v Mazurk* (1954) Times, 4 February, CA. As to the discharge of the third party generally see PARA 133.

2 *Drakeford v Piercy* (1866) 7 B & S 515; *Butwick v Grant* [1924] 2 KB 483. As to the discharge by the third party of his obligation to the principal by payment to an agent having apparent authority see eg *Townsend v Inglis* (1816) Holt NP 278; and PARA 133. As to the authority to receive payment where a solicitor produces a deed containing or indorsed with a receipt by the principal see the Law of Property Act 1925 s 69; **SALE OF LAND** vol 42 (Reissue) PARA 315; **LEGAL PROFESSIONS** vol 66 (2009) PARA 787.

3 *Legge v Byas, Mosley & Co* (1901) 7 Com Cas 16; *Williams v Evans* (1866) LR 1 QB 352; *Sykes v Giles* (1839) 5 M & W 645; *Hogarth v Wherley* (1875) LR 10 CP 630; *Charles v Blackwell* (1877) 2 CPD 151, CA; and see the cases cited in PARA 85 note 6.

4 *Bridges v Garrett* (1870) LR 5 CP 451, Ex Ch; *Walker v Barker* (1900) 16 TLR 393.

5 *International Sponge Importers Ltd v Andrew Watt & Sons* [1911] AC 279, HL; *Bradford & Sons v Price Bros* (1923) 92 LJB 871.

6 *Blumberg v Life Interests and Reversionary Securities Corp* [1897] 1 Ch 171; affd [1898] 1 Ch 27, CA.

7 *Hine Bros v Steamship Insurance Syndicate Ltd, The Netherholme, Glen Holme and Rydal Holme* (1895) 72 LT 79, CA; *Boothman v Byrne* (1923) 57 ILT 36.

8 *Howard v Chapman* (1831) 4 C & P 508.

9 *Breming v Mackie* (1862) 3 F & F 197.

10 *Wiltshire v Sims* (1808) 1 Camp 258.

11 See *Bridges v Garrett* (1870) LR 5 CP 451, Ex Ch (payment by cheque); *Hine Bros v Steamship Insurance Syndicate Ltd, The Netherholme, Glen Holme and Rydal Holme* (1895) 72 LT 79, CA (by bill); *Pelham v Hilder* (1841) 1 Y & C Ch Cas 3 (giving credit); and see PARA 44. Where the principal authorises the agent to receive payment, intending that he pay himself from the sum received a debt due from his principal, the agent may receive payment in any manner: *Barker v Greenwood* (1837) 2 Y & C Ex 414. An agent appointed, on the dissolution of a partnership, by a retiring partner to liquidate the partnership affairs, has no authority to accept bills in the name of his principal: *Odell v Cormack Bros* (1887) 19 QBD 223.

12 *Bartlett v Pentland* (1830) 10 B & C 760; *Barker v Greenwood* (1837) 2 Y & C Ex 414; *Pearson v Scott* (1878) 9 ChD 198; *Anderson v Sutherland* (1897) 13 TLR 163.

13 *Stewart v Aberdein* (1838) 4 M & W 211; *Catterall v Hindle* (1867) LR 2 CP 368, Ex Ch.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/2. AUTHORITY OF THE AGENT/(3) IMPLIED AUTHORITY/39. Authority to give into custody.

### 39. Authority to give into custody.

Whether an agent or servant has implied authority to give persons into custody has been considered in many cases; the test is whether in so doing he is acting within the scope of his ordinary duties, and also within the scope of the employer's powers<sup>1</sup>. If he is, he has implied authority<sup>2</sup>; if he is not, he or his employer or both will be liable in tort to the third party<sup>3</sup>; and it is for the person asserting the existence of the authority to prove it<sup>4</sup>.

To be within the scope of an agent's implied authority, an act must be apparently necessary, arising out of the ordinary discharge of his duties<sup>5</sup>, or to protect the principal's property<sup>6</sup>.

A distinction must be observed between those acts of an agent which are of a reasonable nature and those which are of an excessive or improper character, which latter would not fall within an implied authority<sup>7</sup>. The manager of a restaurant has no implied authority to give a customer into custody on a dispute over the bill<sup>8</sup>, but a person in a similar capacity is justified in giving persons into custody on a charge of creating disorder on the premises<sup>9</sup>.

1 As to arrest generally see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 924 et seq.

2 *Lowe v Great Northern Rly Co* (1893) 62 LJQB 524; *Percy v Glasgow Corpn* [1922] 2 AC 299, HL.

3 *Walker v South Eastern Rly Co* (1870) LR 5 CP 640; *Moore v Metropolitan Rly Co* (1872) LR 8 QB 36. As to actions for false imprisonment arising out of this class of act see *Knight v North Metropolitan Tramways Co* (1898) 78 LT 227; *Charleston v London Tramways Co Ltd* (1888) 4 TLR 629, CA; *Ormiston v Great Western Rly Co* [1917] 1 KB 598; *Tims v John Lewis & Co Ltd* [1951] 2 KB 459, [1951] 1 All ER 814, CA (revsd on other grounds sub nom *John Lewis & Co Ltd v Tims* [1952] AC 676, [1952] 1 All ER 1203, HL).

4 *Goff v Great Northern Rly Co* (1861) 30 LJQB 148.

5 *Lord Bolingbroke v Swindon New Town Local Board* (1874) LR 9 CP 575. There is no implied authority in a servant to do unlawful acts, nor in a solicitor to exceed his necessary duties, eg where issuing fieri facias to direct the sheriff to seize certain goods: *Smith v Keal* (1882) 9 QBD 340, CA.

6 *Hanson v Waller* [1901] 1 KB 390; *Allen v London and South Western Rly Co* (1870) LR 6 QB 65; *Abrahams v Deakin* [1891] 1 QB 516, CA (a railway clerk or manager of a business has no implied authority to give into custody except for the purpose of protecting the property of his employer).

7 *Bank of New South Wales v Owston* (1879) 4 App Cas 270, PC.

8 *Stedman v Baker & Co* (1896) 12 TLR 451, CA.

9 *Ashton v Spiers and Pond* (1893) 9 TLR 606.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/2. AUTHORITY OF THE AGENT/(3) IMPLIED AUTHORITY/40. Illegal acts.

#### 40. Illegal acts.

By virtue of general rules of the common law, no authority can be given to do an illegal act, and no agent can recover remuneration or indemnity against a principal for the performance of an act known by him to be illegal<sup>1</sup>. Powers of attorney given for illegal purposes, for example in general restraint of trade<sup>2</sup>, or to prevent penal legal proceedings<sup>3</sup>, are void.

1 *Collins v Blantern* (1767) 2 Wils 341; *Holman v Johnson* (1775) 1 Cowp 341. See further as to the loss of right to remuneration or indemnity PARAS 110-113.

2 *Mitchel v Reynolds* (1711) 1 P Wms 181.

3 *Kirwan v Goodman* (1841) 9 Dowl 330.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/2. AUTHORITY OF THE AGENT/(3) IMPLIED AUTHORITY/41. Estate agents.

#### 41. Estate agents.

The making of a contract for the sale of land is no part of an estate agent's business<sup>1</sup> and authority to make such a contract is not to be lightly inferred from vague or ambiguous language<sup>2</sup>. Accordingly an estate agent authorised to procure a purchaser has no implied authority to enter into a contract of sale<sup>3</sup> or to give a warranty<sup>4</sup>; nor has an agent who is merely authorised to treat with people and permit them to view the property<sup>5</sup>. Similarly an agent authorised to act 'in and about' a purchase has no implied authority to purchase<sup>6</sup>; but, where definite and unequivocal instructions are given to sell at a stated price, it may be inferred that the agent has authority to enter into an open contract<sup>7</sup>. This, however, does not imply authority either to make conditions as to title<sup>8</sup> or to receive the purchase money<sup>9</sup>.

When a vendor engages an estate agent, he does not thereby confer on the estate agent any implied or ostensible authority to receive as his agent a pre-contract deposit. Where a pre-contract deposit is paid to the estate agent the purchaser is the only person with a right or claim to the deposit money until contract, the vendor has no claim to or control over the deposit money and consequently is under no liability to the purchaser to repay it in the event of default by the estate agent<sup>10</sup>. An estate agent who claims to be a sole agent has no implied authority to appoint a sub-agent<sup>11</sup>. Where the agent employs a sub-agent without authority, the principal will not be liable to refund a deposit paid to the sub-agent should the latter default; the agent only will be so liable<sup>12</sup>.

- 1 As to the regulation of the activities of estate agents under the Estate Agents Act 1979 see PARAS 239-281.
- 2 *Wragg v Lovett* [1948] 2 All ER 968, CA, per Lord Greene MR.
- 3 *Hamer v Sharp* (1874) LR 19 Eq 108; *Chadburn v Moore* (1892) 61 LJ Ch 674; *Prior v Moore* (1887) 3 TLR 624; *Wilde v Watson* (1878) 1 LR Ir 402; *Thuman v Best* (1907) 97 LT 239; *Carney v Fair* (1902) 54 ILT 61; *Lewcock v Bromley* (1920) 127 LT 116; and see *Yallop v Fosh* (1953) 161 Estates Gazette 603 (no implied authority to grant new lease to existing tenant). He has, however, authority to describe the property and state facts affecting its value: *Mullens v Miller* (1882) 22 ChD 194.
- 4 *Hill v Harris* [1965] 2 QB 601, [1965] 2 All ER 358, CA.
- 5 *Godwin v Brind* (1868) 17 WR 29.
- 6 *Vale of Neath Colliery Co v Furness* (1876) 45 LJ Ch 276.
- 7 *Rosenbaum v Belson* [1900] 2 Ch 267; *Keen v Mear* [1920] 2 Ch 574. There is a substantial difference between 'to sell' and 'to find a purchaser': see *Lewcock v Bromley* (1920) 127 LT 116; and cf *Carney v Fair* (1902) 54 ILT 61; *AH Allen & Co Ltd v Whiteman* (1920) 89 LJ Ch 534; *Wragg v Lovett* [1948] 2 All ER 968, CA; and see *Davies v Sweet* [1962] 2 QB 300, [1962] 1 All ER 92, CA.
- 8 *Keen v Mear* [1920] 2 Ch 574.
- 9 *Mynn v Joliffe* (1834) 1 Mood & R 326. Cf *Butwick v Grant* [1924] 2 KB 483, DC.
- 10 *Sorrell v Finch* [1977] AC 728, [1976] 2 All ER 371, HL, which overruled *Goding v Frazer* [1966] 3 All ER 234, [1967] 1 WLR 286 and *Burt v Claude Cousins & Co Ltd* [1971] 2 QB 426, [1971] 2 All ER 611, CA, and doubted *Ryan v Pilkington* [1959] 1 All ER 689, [1959] 1 WLR 403, CA. As to pre-contract deposits see PARA 248.
- 11 *John McCann & Co v Pow* [1975] 1 All ER 129, [1974] 1 WLR 1643, CA; and see *Robert Bruce & Partners v Winyard Developments* [1987] 1 EGLR 20.
- 12 See *Maloney v Hardy and Moorshed* [1971] 2 QB 442n, [1971] 2 All ER 630n, CA. As to delegation to sub-agents generally see PARAS 51-56.

## UPDATE

### 41 Estate agents

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/2. AUTHORITY OF THE AGENT/(3) IMPLIED AUTHORITY/42. Bailiffs and stewards.

### 42. Bailiffs and stewards.

A bailiff authorised to distrain has implied authority to receive the rent, but a man left in possession by the bailiff has no such implied authority<sup>1</sup>.

A steward has implied authority to give or receive notices to quit<sup>2</sup>, but a mere rent collector has not<sup>3</sup>; nor has a steward implied authority to bind his principal by signing bills of exchange<sup>4</sup>, or by a contract to grant a lease for a term of years<sup>5</sup>. A steward appointed for a particular occasion has a more limited implied authority than one appointed to act generally, and when

appointed only for the purpose of maintaining order on a special occasion, has no authority to commit an assault<sup>6</sup>.

1 *Hatch v Hale* (1850) 15 QB 10; *Boulton v Reynolds* (1859) 2 E & E 369. An agent authorised to receive rents for his own benefit has no authority to distrain therefor: *Ward v Shew* (1833) 9 Bing 608. As to the landlord's liability in respect of a bailiff's acts see further **DISTRESS** vol 13 (2007 Reissue) PARA 1001. As to the liability of the landlord to indemnify the bailiff see **DISTRESS** vol 13 (2007 Reissue) PARA 993.

2 *Roe d Dean and Chapter of Rochester v Pierce* (1809) 2 Camp 96; *Papillon v Brunton* (1860) 5 H & N 518; *Jones v Phipps* (1868) LR 3 QB 567. See also *Harmond Properties Ltd v Gajdzis* [1968] 3 All ER 263, [1968] 1 WLR 1858, CA (authority of director of property company to give notice to quit).

3 *Pearse v Boulter* (1860) 2 F & F 133. Cf *Barker v Levinson* [1951] 1 KB 342, [1950] 2 All ER 825 (rent collector has no authority to take illegal premium).

4 *Davidson v Stanley* (1841) 3 Scott NR 49.

5 *Collen v Gardner* (1856) 21 Beav 540, on the ground that a steward is employed to manage property, which does not involve a right to contract with tenants, nor is any such custom established, although he may contract for the usual and customary leases: *Peers v Sneyd* (1853) 17 Beav 151. Cf *Barker v Levinson* [1951] 1 KB 342, [1950] 2 All ER 825. See further **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 931.

6 *Lucas v Mason* (1875) LR 10 Exch 251.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/2. AUTHORITY OF THE AGENT/(3) IMPLIED AUTHORITY/43. Factors.

### 43. Factors.

The implied authority of a factor<sup>1</sup> includes, subject to special instructions, authority:

- 12 (1) to sell in his own name<sup>2</sup>;
- 13 (2) to sell on reasonable credit<sup>3</sup>, and at such time and price as he may think best for his principal<sup>4</sup>;
- 14 (3) to warrant<sup>5</sup>; and
- 15 (4) to receive payment when he has sold in his own name<sup>6</sup>.

It does not include authority to barter<sup>7</sup> or pledge<sup>8</sup> the principal's goods, or the bill of lading therefor<sup>9</sup>, or to delegate his authority<sup>10</sup>, save as to purely ministerial acts<sup>11</sup>.

1 As to the meaning of 'factor' see PARA 12.

2 *Baring v Corrie* (1818) 2 B & Ald 137; *Re Henley, ex p Dixon* (1876) 4 ChD 133, CA. As to dispositions by mercantile agents see generally PARAS 148-149.

3 *Houghton v Matthews* (1803) 3 Bos & P 485; *Scott v Surman* (1742) Willes 400.

4 *Smart v Sandars* (1846) 3 CB 380.

5 *Pickering v Busk* (1812) 15 East 38. This authority apparently arises only where there exists a custom to warrant the class of article sold: *Dingle v Hare* (1859) 7 CBNS 145.

6 *Drinkwater v Goodwin* (1775) 1 Cowp 251. This authority relates only to payment by the usual mode of payment: *Underwood v Nicholls* (1855) 17 CB 239; and see further PARA 38.

7 *Guerreiro v Peile* (1820) 3 B & Ald 616.

8 *Fielding v Kymer* (1821) 2 Brod & Bing 639, sub nom *Gill v Kymer* (1821) 5 Moore CP 503; *Martini v Coles* (1813) 1 M & S 140; *Paterson v Tash* (1743) 2 Stra 1178; *Guichard v Morgan* (1819) 4 Moore CP 36.

9 *Newsom v Thornton* (1805) 6 East 17.

10 *Cockran v Irlam* (1814) 2 M & S 301; *Solly v Rathbone* (1814) 2 M & S 298.

11 See PARAS 51-53.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/2. AUTHORITY OF THE AGENT/(3) IMPLIED AUTHORITY/44. Custom and usage.

#### 44. Custom and usage.

An agent also has implied authority to act in accordance with the customs and usages of the place where<sup>1</sup>, or the business in respect of which<sup>2</sup>, his express authority permits him to act, subject to the condition that such customs and usages must not be unreasonable, or change the essential nature of the contract of agency<sup>3</sup>. Where the agent is a professional person, a contract made in the ordinary course of his profession and as agent is deemed to incorporate all reasonable<sup>4</sup> usages, rules and regulations of that profession<sup>5</sup>.

Provided that the custom or usage is reasonable, the agent's implied authority to act in accordance with it is not affected by the fact that the principal may have been unaware of its existence<sup>6</sup>; and the agent is entitled to indemnity from his principal against losses caused by acting in accordance with it<sup>7</sup>. Reliance will not, however, be permitted on a custom which is in direct conflict with the express terms of the contract of agency<sup>8</sup>.

What is a reasonable custom or usage is a question of law<sup>9</sup>. It must be a generally recognised custom or usage, and not merely a course of business between the agent and the third party<sup>10</sup>.

An agent has, however, no implied authority to act in accordance with an unreasonable custom or usage unless the principal has notice of the custom or usage and agrees to be bound by it<sup>11</sup>; the burden of proving that the principal had notice of it lies on the person alleging the existence of the authority<sup>12</sup>.

1 *Foster v Pearson* (1835) 1 Cr M & R 849; *Bayliffe v Butterworth* (1847) 1 Exch 425; *Pollock v Stables* (1848) 12 QB 765.

2 *Lienard v Dresslar* (1862) 3 F & F 212.

3 *Robinson v Mollett* (1875) LR 7 HL 802; *Bostock v Jardine* (1865) 3 H & C 700.

4 As to reasonableness see note 10.

5 *Graves v Legg* (1857) 2 H & N 210; *Stray v Russell* (1859) 1 E & E 888 (affd (1860) 1 E & E 916, Ex Ch); *London Founders' Association Ltd and Palmer v Clarke* (1888) 20 QBD 576, CA.

6 *Scott and Horton v Godfrey* [1901] 2 KB 726; *Consolidated Goldfields of South Africa v E Spiegel & Co* (1909) 100 LT 351; see also *Beckhuson and Gibbs v Hamblet* [1901] 2 KB 73, CA; *Cropper v Cook* (1868) LR 3 CP 194; *Sutton v Tatham* (1839) 10 Ad & El 27; *Fal Bunkering of Sharjah v Grecale Inc of Panama* [1990] 1 Lloyd's Rep 369. As to usages of the stock exchange see *Maxted v Paine* (1869) LR 4 Exch 203 (affd (1871) LR 6 Exch 132); *Robinson v Mollett* (1875) LR 7 HL 802.

7 *Harker v Edwards* (1887) 57 LJQB 147, CA.

8 See *Bower v Jones* (1831) 8 Bing 65; *Cruse v Paine* (1869) 4 Ch App 441; *Grissell v Bristowe* (1868) LR 4 CP 36; *Robinson v Mollett* (1875) LR 7 HL 802; see also *Laskin v Bache & Co Inc* [1972] 1 OR 465, 23 DLR (3d) 385, Ont CA.

9 See *Bradburn v Foley* (1878) 3 CPD 129; and **CUSTOM AND USAGE** vol 12(1) (Reissue) PARA 651.

10 *Coles v Bristowe* (1868) 4 Ch App 3; *Re Williams, ex p Howell* (1865) 12 LT 785, CA. For examples of usages which have been held to be reasonable see *Bridges v Garrett* (1870) LR 5 CP 451 (receipt of payment by cheque); *Walker v Barker* (1900) 16 TLR 393, DC (payment by cheque made out to agent); *Cropper v Cook* (1868) LR 3 CP 194 (agent incurring personal liability on the contract); *Pelham v Hilder* (1841) 1 Y & C Ch Cas 3 (sale on credit); *Scott and Horton v Godfrey* [1901] 2 KB 726 (consolidation of orders); *Produce Brokers Co Ltd v Olympia Oil and Cake Co Ltd* [1917] 1 KB 320, CA (buyers to accept shippers' appropriation); *Anglo Overseas Transport Co Ltd v Titan Industrial Corpn (United Kingdom) Ltd* [1959] 2 Lloyd's Rep 152 (personal liability of forwarding agents for cost of freight space).

For examples of customs which have been held to be unreasonable see *Sweeting v Pearce* (1859) 7 CBNS 449 (affd (1861) 9 CBNS 534, Ex Ch); *Matveieff & Co v Crossfield* (1903) 51 WR 365; *McCowin Lumber and Export Co Inc v Pacific Marine Insurance Co Ltd* (1922) 38 TLR 901 (all cases of set-off by insurers against insurance brokers); *Robinson v Mollett* (1875) LR 7 HL 802 (tallow market: agent acting as principal); *Marsh v Jelf* (1862) 3 F & F 234 (auctioneer selling by private contract); *Blackburn v Mason* (1893) 68 LT 510, CA (set-off by stockbroker); *Thuman v Best* (1907) 97 LT 239 (contract for lease by estate agent); *Fullwood v Hurley* [1928] 1 KB 498, CA (commission from vendor and purchaser); *Anglo-African Merchants Ltd v Bayley* [1970] 1 QB 311, [1969] 2 All ER 421; *North and South Trust Co v Berkeley, Berkeley v North and South Trust Co* [1971] 1 All ER 980, [1971] 1 WLR 470 (both cases of insurance broker acting as agent for insurers for certain purposes). See further **CUSTOM AND USAGE** vol 12(1) (Reissue) PARA 659.

11 *Blackburn v Mason* (1893) 68 LT 510, CA; *Hamilton v Young* (1881) LR 7 Ir 289; *Stewart v Aberdeen* (1838) 4 M & W 211; *Sweeting v Pearce* (1861) 9 CBNS 534; *Bartlett v Pentland* (1830) 10 B & C 760; *Perry v Barnett* (1885) 15 QBD 388, CA; *Robinson v Mollett* (1875) LR 7 HL 802 (in which the opinions of the judges were taken); *Bostock v Jardine* (1865) 3 H & C 700; *Scott v Irving* (1830) 1 B & Ad 605. The principal may be precluded from denying the usage, for example by not being permitted to revoke an authority under which the agent, by usage, has incurred a personal liability: *Seymour v Bridge* (1885) 14 QBD 460.

12 *Matveieff & Co v Crossfield* (1903) 51 WR 365.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/2. AUTHORITY OF THE AGENT/(4) EXERCISE OF AUTHORITY/45. Exercise of authority under deed.

## **(4) EXERCISE OF AUTHORITY**

### **45. Exercise of authority under deed.**

An agent acting under a power of attorney should, as a general rule, act in the name of the principal<sup>1</sup>. If he is authorised to sue on the principal's behalf, the claim should be brought in the principal's name<sup>2</sup>. A deed executed in pursuance of such a power is properly executed in the name of the principal or with words to show that the agent is signing for him<sup>3</sup>, but if the donee of the power is an individual he may, if he thinks fit and where so authorised by the donor of the power, execute any instrument with his own signature<sup>4</sup>, and act in his own name<sup>5</sup>. This provision for execution and action by the donee in his own name exists as an alternative to the statutory procedure for the execution of a conveyance by the attorney of a corporation<sup>6</sup>. Any instrument executed or thing done under this provision<sup>7</sup> is as effective as if executed by the donee in any manner which would constitute due execution of that instrument by the donor or, as the case may be, as if done by the donee in the name of the donor<sup>8</sup> (except in the case of an instrument executed by the donee as a deed, in which case it is as effective as if executed by the donee in a manner which would constitute due execution of it as a deed by the donor only if it is executed in accordance with the appropriate statutory requirements<sup>9</sup>).

The attorney of a corporation sole or aggregate may execute a conveyance by signing the name of the corporation in the presence of at least one witness who attests the signature<sup>10</sup>. A corporation aggregate appointed the attorney of any person or corporation to convey any property may execute instruments by signing them in the name of such person or corporation by an officer duly appointed for such purpose<sup>11</sup>.

- 1 As to the effect of acts by an agent where the principal is undisclosed see PARAS 47, 157.
  - 2 *Jones and Saldanha v Gurney* [1913] WN 72.
  - 3 *White v Cuyler* (1795) 6 Term Rep 176; *Wilks v Back* (1802) 2 East 142; *Berkeley v Hardy* (1826) 8 Dow & Ry KB 102; *M'Ardle v Irish Iodine and Marine Salts Manufacturing Co* (1864) 15 ICLR 146.
  - 4 Powers of Attorney Act 1971 s 7(1)(a) (amended by the Law of Property (Miscellaneous Provisions) Act 1989 s 1(8), Sch 1 para 7(1)).
  - 5 Powers of Attorney Act 1971 s 7(1)(b). This provision does not enlarge the scope of things which may be done by the donee of a power of attorney; it is merely procedural: *Clauss v Pir* [1988] Ch 267, [1987] 2 All ER 752.
  - 6 Powers of Attorney Act 1971 s 7(2) (amended by the Law of Property (Miscellaneous Provisions) Act 1989 ss 1(8), 4, Sch 1 para 7(2), Sch 2). The statutory procedure referred to is that under the Law of Property Act 1925 s 74(3) (see the text and note 10).
  - 7 le under the Powers of Attorney Act 1971 s 7(1) (see the text and notes 3-5).
  - 8 Powers of Attorney Act 1971 s 7(1) (s 7(1) amended, s 7(1A) added, by the Regulatory Reform (Execution of Deeds and Documents) Order 2005, SI 2005/1906, art 1). This provision applies whenever the power of attorney was created: Powers of Attorney Act 1971 s 7(4).
  - 9 Powers of Attorney Act 1971 s 7(1A) (as added: see note 8). 'The appropriate statutory requirements' are the Law of Property (Miscellaneous Provisions) Act 1989 s 1(3)(a) (see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 33); Powers of Attorney Act 1971 s 7(1A) (as so added).
  - 10 Law of Property Act 1925 s 74(3) (amended by the Law of Property (Miscellaneous Provisions) Act 1989 s 4, Sch 2; and by SI 2005/1906).
  - 11 Law of Property Act 1925 s 74(4) (amended by SI 2005/1906). If the instrument is to be a deed it must be signed in the presence of a witness who attests the signature: Law of Property Act 1925 s 74(4) (as so amended). This applies to powers conferred on agents appointed before or since 1926 (s 74(5)), and is in addition to any other powers which may be exercised by or on behalf of corporations (s 74(6)). Instruments to which s 74(4) applies may not be executed under the alternative procedure prescribed in the Powers of Attorney Act 1971 s 7(1) (see the text and notes 1-8); s 7(2) (as amended: see note 6). As to the making of contracts by corporations generally see PARAS 20-23.
- An instrument is validly executed by a corporation aggregate as a deed for the purposes of the Law of Property (Miscellaneous Provisions) Act 1989 s 1(2)(b) (see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 8) if and only if, it is duly executed by the corporation and it is delivered as a deed: Law of Property Act 1925 s 74A(1) (s 74A added by SI 2005/1906). An instrument is presumed to be delivered for these purposes upon its being executed, unless a contrary intention is proved: Law of Property Act 1925 s 74A(1) (as so added).

## UPDATE

### 45 Exercise of authority under deed

NOTE 11--Law of Property Act 1925 s 74(6) amended: SI 2009/1941.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/2. AUTHORITY OF THE AGENT/(4) EXERCISE OF AUTHORITY/46. Signature of documents.

### 46. Signature of documents.

At common law the general rule<sup>1</sup> is that a person sufficiently signs a document if it is signed in his name and with his authority by someone else; and in such case the agent's signature is treated as that of his principal<sup>2</sup>. Although it is usual and the better practice to indicate on the document that the signature the agent has written is not that of the principal, omission so to do, though misleading and undesirable, does not invalidate the document<sup>3</sup>.



1 Personal signature may be required by statute: cf PARA 3.

2 See *R v Kent Justices* (1873) LR 8 QB 305; *R v Cowper* (1890) 24 QBD 533, CA; *France v Dutton* [1891] 2 QB 208, DC; *LCC v Agricultural Food Products Ltd* [1955] 2 QB 218, [1955] 2 All ER 229, CA; *Tennant v LCC* (1957) 121 JP 428, CA; and see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 13.

3 *LCC v Vitamins Ltd* [1955] 2 QB 218, [1955] 2 All ER 229, CA.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/2. AUTHORITY OF THE AGENT/(4) EXERCISE OF AUTHORITY/47. Effect of not disclosing principal.

#### **47. Effect of not disclosing principal.**

An agent having authority to sign a bill of exchange cannot render his principal liable thereon by signing in his own name<sup>1</sup>. Subject to this rule and to any personal liability which the agent may incur by reason of acting in his own name<sup>2</sup>, an agent may exercise his authority, whether orally or by writing, without disclosing the name or existence of his principal<sup>3</sup>.

1 *Leadbitter v Farrow* (1816) 5 M & S 345; and see *Bult v Morrell* (1840) 12 Ad & El 745; *Elliott v Bax-Ironside* [1925] 2 KB 301, CA; *Kettle v Dunster and Wakefield* (1927) 138 LT 158; but see *Lindus v Bradwell* (1848) 5 CB 583 (where, however, the agent was a married woman, who, as such, could at that time only sign as agent).

2 See PARAS 156-159.

3 *Calder v Dobell* (1871) LR 6 CP 486; *Wilson v Hart* (1817) 1 Moore CP 45; *Weidner v Hoggett* (1876) 1 CPD 533. As to the effect of non-disclosure of the principal as between the principal and the third party see PARA 125.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/3. DELEGATION/(1) GENERAL RULE AGAINST DELEGATION/48. Agent's powers not generally delegable.

### **3. DELEGATION**

#### **(1) GENERAL RULE AGAINST DELEGATION**

##### **48. Agent's powers not generally delegable.**

Delegation by an agent, that is the entrusting to another person by an agent of the exercise of a power or duty entrusted to him by his principal, is in general prohibited, under the maxim *delegatus non potest delegare*, without the express authority of the principal<sup>1</sup>, or authority derived from statute<sup>2</sup>.

Where there is personal confidence reposed in or skill required from the agent<sup>3</sup> there normally may be no delegation, however general the nature of the duties<sup>4</sup>, unless urgent necessity compels the handing over of the responsibility to another<sup>5</sup>.

1 *Sims v Brittain* (1832) 1 Nev & MKB 594.

2 Certain powers of delegation are conferred by statute on trustees and personal representatives; see the Trustee Act 1925 s 25; the Trustee Act 2000 Pt IV (ss 11-27); and **TRUSTS** vol 48 (2007 Reissue) PARA 984 et seq. There is no power to delegate a judicial function (*Barnard v National Dock Labour Board* [1953] 2 QB 18, [1953]

1 All ER 1113, CA), or other statutory disciplinary functions (*Vine v National Dock Labour Board* [1957] AC 488, [1956] 3 All ER 939, HL). As to delegation by directors see PARA 50.

3 *Cockran v Irlam* (1814) 2 M & S 301; *Catlin v Bell* (1815) 4 Camp 183; *Henderson v Barnewall* (1827) 1 Y & J 387; *Re County Palatine Loan and Discount Co, Cartmell's Case* (1874) 9 Ch App 691; *Tarry v Ashton* (1876) 1 QBD 314; *Doe d Rhodes v Robinson* (1837) 3 Bing NC 677. In the absence of express authority, an estate agent may not delegate his duties which require personal skill and competence: *John McCann & Co v Pow* [1975] 1 All ER 129, [1974] 1 WLR 1643, CA, considered in *Robert Bruce & Partners v Winyard Developments* [1987] 1 EGLR 20.

4 *St Margaret, Rochester, Burial Board v Thompson* (1871) LR 6 CP 445.

5 *De Bussche v Alt* (1878) 8 ChD 286, CA; *Gwilliam v Twist* [1895] 2 QB 84, CA.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/3. DELEGATION/(1) GENERAL RULE AGAINST DELEGATION/49. Ministers of the Crown and local authorities.

#### 49. Ministers of the Crown and local authorities.

Where functions entrusted to a minister are performed by an official employed in the minister's department there is in law no delegation because constitutionally the act or decision of the official is that of the minister<sup>1</sup>. Similarly, where a local authority appoints a committee for the discharge of certain of its functions<sup>2</sup>, the committee is merely machinery for the discharge by the authority of the business entrusted to the committee all of whose acts are subject to the authority's approval<sup>3</sup>.

1 *Carltona Ltd v Works Comrs* [1943] 2 All ER 560; *Lewisham Metropolitan Borough and Town Clerk v Roberts* [1949] 2 KB 608, [1949] 1 All ER 815, CA; and see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 365.

2 See under the powers in the Local Government Act 1972 ss 101, 102. See further **LOCAL GOVERNMENT** vol 69 (2009) PARAS 370, 371 et seq.

3 *R v Sunderland Corpn* [1911] 2 KB 458, DC; *Osgood v Nelson* (1872) LR 5 HL 636; *Huth v Clarke* (1890) 25 QBD 391, DC; *Manton v Brighton Corpn* [1951] 2 KB 393, [1951] 2 All ER 101.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/3. DELEGATION/(1) GENERAL RULE AGAINST DELEGATION/50. Directors of companies.

#### 50. Directors of companies.

The powers and duties of directors cannot be delegated except in accordance with the articles of association of the company<sup>1</sup>. Where, however, there has been a purported or apparent delegation in favour of a sub-agent and such delegation if duly made would have been within the scope of a power in the articles, any internal management irregularity will be disregarded in relation to those who deal bona fide with the sub-agent and without knowledge of such irregularity<sup>2</sup>.

1 *Re County Palatine Loan and Discount Co, Cartmell's Case* (1874) 9 Ch App 691; *Re Leeds Banking Co, Howard's Case* (1866) 1 Ch App 561; *Totterdell v Fareham Blue Brick and Tile Co Ltd* (1866) LR 1 CP 674.

2 See *Mahony v East Holyford Mining Co* (1875) LR 7 HL 869; *Biggerstaff v Rowatt's Wharf Ltd, Howard v Rowatt's Wharf Ltd* [1896] 2 Ch 93, CA; *Freeman and Lockyer (a firm) v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480, [1964] 1 All ER 630, CA.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/3. DELEGATION/(2) IMPLIED AUTHORITY TO DELEGATE/51. Permissible delegation.

## (2) IMPLIED AUTHORITY TO DELEGATE

### 51. Permissible delegation.

An authority to delegate will in some cases be implied, generally on the ground that there is no personal confidence reposed or skill required, and that the duties are capable of being equally well discharged by any person<sup>1</sup>.

Authority to delegate will be implied in the case of purely ministerial acts, where no special discretion or skill is required<sup>2</sup>, and in the case of acts subsidiary to the main purpose<sup>3</sup>. Thus authority to sign may in general be delegated<sup>4</sup>; but, in cases where an agent has implied authority to sign a contract for both parties, for example where the agent is an auctioneer or broker, the signature of his clerk will not suffice<sup>5</sup>; nor was the signature of the clerk of an authorised agent sufficient for the purposes of a memorandum in order to satisfy the requirements of the Statute of Frauds<sup>6</sup>.

<sup>1</sup> See PARA 48.

<sup>2</sup> *St Margaret, Rochester, Burial Board v Thompson* (1871) LR 6 CP 445 (delegation by sexton); *Parker v Kett* (1701) 1 Ld Raym 658 (delegation by steward of manor).

<sup>3</sup> *Re London and Mediterranean Bank, ex p Birmingham Banking Co* (1868) 3 Ch App 651; *Re Marshall, ex p Sutton* (1788) 2 Cox Eq Cas 84, where an agent was authorised to draw bills in the common course of business, and it was held that he could do this by means of his clerk; see also *Henderson v Barnewall* (1827) 1 Y & J 387; *Murphy v Boese* (1875) LR 10 Exch 126; *LCC v Hobbis* (1896) 75 LT 687; *Coles v Trecothick* (1804) 9 Ves 234; *Hemming v Hale* (1859) 7 CBNS 487; *Rossiter v Trafalgar Life Assurance Association* (1859) 27 Beav 377.

<sup>4</sup> *Mason v Joseph* (1804) 1 Smith KB 406; *Lord v Hall* (1849) 2 Car & Kir 698; *Brown v Tombs* [1891] 1 QB 253; *Allam & Co Ltd v Europa Poster Services Ltd* [1968] 1 All ER 826, [1968] 1 WLR 638.

<sup>5</sup> *Peirce v Corf* (1874) LR 9 QB 210; *Bell v Balls* [1897] 1 Ch 663.

<sup>6</sup> See the Statute of Frauds (1677) s 4 (now relating only to contracts of guarantee: see further **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1052 et seq). See also *Blore v Sutton* (1817) 3 Mer 237; *Doe d Rhodes v Robinson* (1837) 3 Bing NC 677; and the cases cited in note 5.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/3. DELEGATION/(2) IMPLIED AUTHORITY TO DELEGATE/52. Custom or usage.

### 52. Custom or usage.

Delegation is also permissible if it is in accordance with a reasonable custom or usage of trade<sup>1</sup>. Thus a master of a foreign ship may be justified in delegating the signing of a charterparty to a shipbroker<sup>2</sup>, and a country solicitor may employ his town agent, who has power to bind the client in the ordinary course<sup>3</sup>.

<sup>1</sup> *De Bussche v Alt* (1878) 8 ChD 286, CA.

2 *The Fanny, The Matilda* (1883) 5 Asp MLC 75, CA. See also *Moon v Witney Union Guardians* (1837) 3 Bing NC 814.

3 See eg *Griffiths v Williams* (1787) 1 Term Rep 710; *Solley v Wood* (1852) 16 Beav 370; *Re Newen* [1903] 1 Ch 812; and **LEGAL PROFESSIONS** vol 66 (2009) PARA 1030.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/3. DELEGATION/(2) IMPLIED AUTHORITY TO DELEGATE/53. Acquiescence of principal or necessity.

### 53. Acquiescence of principal or necessity.

Where the principal knows of the agent's intention at the time of his employment to delegate, or subsequently acquiesces in the delegation, or where the very nature of the employment necessitates a partial or total delegation, the rule prohibiting delegation can have no application<sup>1</sup>. Where there is a ratification by the principal of the acts of the sub-agent, the sub-agent becomes jointly liable with the agent to the principal<sup>2</sup>. Ratification or adoption of the delegation may be evident from the conduct of the parties<sup>3</sup>.

Where unforeseen circumstances arise, the necessity of the case may make it imperative to delegate, and authority so to do will be implied<sup>4</sup>. That authority will not be implied, however, unless the exigencies of the situation preclude communication at the material time between the agent and his principal<sup>5</sup>.

1 Thus an English contractor for a railway in Canada, known not to be personally undertaking the work, was entitled to engage a sub-agent: *Quebec and Richmond Rly Co v Quinn* (1858) 12 Moo PCC 232.

2 *Keay v Fenwick* (1876) 1 CPD 745, CA; *Dew v Metropolitan Rly Co* (1885) 1 TLR 358, CA.

3 *De Bussche v Alt* (1878) 8 ChD 286, CA.

4 See *De Bussche v Alt* (1878) 8 ChD 286, CA.

5 *Gwilliam v Twist* [1895] 2 QB 84, CA; see also *Harris v Fiat Motors Ltd* (1906) 22 TLR 556.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/3. DELEGATION/(3) POSITION OF SUB-AGENT/54. Privity between principal and sub-agent.

## (3) POSITION OF SUB-AGENT

### 54. Privity between principal and sub-agent.

As a general rule there is no privity of contract between the principal and a sub-agent (as distinct from a co-agent), the sub-agent being liable only to his employer, the agent<sup>1</sup>. The rule will not apply where the principal was a party to the appointment of the sub-agent, or has subsequently adopted his acts, and it was the intention of the parties that privity of contract should be established between them<sup>2</sup>.

1 *Mackersy v Ramsays, Bonars & Co* (1843) 9 Cl & Fin 818, HL; *Schmaling v Thomlinson* (1815) 6 Taunt 147; *Cobb v Becke* (1845) 6 QB 930; *A-G v Earl of Chesterfield* (1854) 18 Beav 596; *New Zealand and Australian Land Co v Watson* (1881) 7 QBD 374, CA; *Dunlop & Sons v De Murrieta & Co* (1886) 3 TLR 166, CA; *Lockwood v Abdy* (1845) 14 Sim 437; *Montagu v Forwood* [1893] 2 QB 350, CA; *Pinto v Santos* (1814) 1 Marsh 132; *Calico Printers' Association Ltd v Barclays Bank Ltd* (1931) 145 LT 51, CA.

2 *De Bussche v Alt* (1878) 8 ChD 286, CA; discussed in *Velos Group Ltd v Harbour Insurance Services Ltd* [1997] 2 Lloyd's Rep 461; *Prentis Donegan & Partners Ltd v Leeds & Leeds Co Inc* [1998] 2 Lloyd's Rep 326.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/3. DELEGATION/(3) POSITION OF SUB-AGENT/55. Classes of sub-agents.

## 55. Classes of sub-agents.

There may be said to be three classes of sub-agents:

- 16 (1) those employed without the authority, express or implied, of the principal, by whose acts the principal is not bound<sup>1</sup>;
- 17 (2) those employed with the express or implied authority of the principal, but between whom and the principal there is no privity of contract<sup>2</sup>; and
- 18 (3) those employed with the principal's authority, between whom and the principal there is privity of contract, and a direct relationship of principal and agent is, accordingly, established<sup>3</sup>.

For the acts and defaults of the first two classes the agent is responsible to the principal<sup>4</sup>; in the third case the sub-agent has both the rights and the liabilities of an agent vis-à-vis the principal<sup>5</sup>.

1 *Blore v Sutton* (1817) 3 Mer 237; *Wray v Kemp* (1884) 26 ChD 169; *Dunlop & Sons v De Murrieta & Co* (1886) 3 TLR 166, CA; *Re Becket, Purnell v Paine* [1918] 2 Ch 72, CA.

2 See PARA 54.

3 See PARA 54.

4 *Mackersy v Ramsays, Bonars & Co* (1843) 9 Cl & Fin 818, HL (where an agent employed to obtain payment employed a sub-agent in India and payment was made to the sub-agent but not credited to the agent, the agent was liable for the sub-agent's failure on the ground that the principal should not suffer loss through a sub-agent with whom he had no privity); see also *Swire v Francis* (1877) 3 App Cas 106, PC; *Skinner & Co v Weguelin, Eddowes & Co* (1882) 1 Cab & El 12; *Re Mitchell, Mitchell v Mitchell* (1884) 54 LJ Ch 342; *Ecossaise Steamship Co Ltd v Lloyd, Low & Co* (1890) 7 TLR 76; *Meyerstein v Eastern Agency Co Ltd* (1885) 1 TLR 595. See further PARA 98.

5 *De Bussche v Alt* (1878) 8 ChD 286, CA.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/3. DELEGATION/(3) POSITION OF SUB-AGENT/56. Remuneration and liability of sub-agent.

## 56. Remuneration and liability of sub-agent.

The sub-agent, not as a rule being brought into contractual relationship with the principal, must look to the agent for his remuneration and indemnity<sup>1</sup>. Thus, where an agent for the transport of goods without authority delegated his entire duties, it was held that the person performing them was not entitled to recover for his services against the principal<sup>2</sup>.

Similarly, as a general rule, a sub-agent is accountable only to the agent who employs him, and that agent in turn to his principal<sup>3</sup>, so that a sub-agent taking over the conduct of the principal's business is not liable to render an account to the principal<sup>4</sup> and even if the sub-agent is negligent, he cannot be sued directly by the principal<sup>5</sup>. Where, however, there is privity

between the principal and the sub-agent<sup>6</sup>, or sufficient knowledge by the sub-agent concerning the true position of the parties for some fiduciary obligation to be implied<sup>7</sup>, the sub-agent may be held liable to the principal for money had and received to the principal's use from third parties<sup>8</sup>.

1 *Solly v Rathbone* (1814) 2 M & S 298; *Mason v Clifton* (1863) 3 F & F 899. Cf *Hampton v Glamorgan County Council* [1917] AC 13, HL. See, however, the Contracts (Rights of Third Parties) Act 1999, which sets out the circumstances under which a person who is not a party to a contract may nevertheless enforce its terms; and **CONTRACT**.

2 *Schmaling v Thomlinson* (1815) 6 Taunt 147.

This rule is unaffected by the Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053. A 'commercial agent' is defined for those purposes as a self-employed intermediary who has continuing authority to negotiate the sale or purchase of goods on behalf of another person (the 'principal') or to negotiate and conclude the sale or purchase of goods on behalf of and in the name of that principal (see reg 2(1); and PARA 72): if a sub-agent has no authority to negotiate, it follows that he is not entitled to look to the principal for remuneration.

3 *Stephens v Badcock* (1832) 3 B & Ad 354; *Sims v Brittain* (1832) 1 Nev & MKB 594.

4 *Lockwood v Abdy* (1845) 14 Sim 437; *Cartwright v Hateley* (1791) 1 Ves 292.

5 *Balsamo v Medici* [1984] 2 All ER 304, [1984] 1 WLR 951.

6 See PARA 54.

7 See *Powell and Thomas v Evan Jones & Co* [1905] 1 KB 11, CA; and PARA 73.

8 See *Moody v Spencer* (1822) 2 Dow & Ry KB 6; *Robbins v Heath* (1848) 11 QB 257; *Ex p Edwards* (1881) 8 QBD 262, CA; *Powell and Thomas v Evan Jones & Co* [1905] 1 KB 11, CA. For a consideration of the right of the principal to recover money paid through an agent to a sub-agent for the purpose of paying a third party, where the sub-agent appropriated the money to a debt owed by the agent to the sub-agent, see *Cobb v Becke* (1845) 6 QB 930.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/4. RATIFICATION/(1) GENERAL PRINCIPLE/57. Retrospective ratification of agent's acts.

## 4. RATIFICATION

### (1) GENERAL PRINCIPLE

#### 57. Retrospective ratification of agent's acts.

Under certain conditions an act which, at the time it was entered into or done by an agent, lacked the authority, express or implied, of a principal, may by the subsequent conduct of the principal become ratified by him and made as effectively his own as if he had previously authorised it.

Where the act has been done by a person not assuming to act on his own behalf<sup>1</sup>, but for another, though without his precedent authority<sup>2</sup> or knowledge<sup>3</sup>, and is subsequently ratified by that other person, the relation of principal and agent is constituted retrospectively, and the principal is bound by the act whether it is to his advantage or detriment, and whether liability therefor is founded in contract or in tort, to the same extent and with all the same consequences as if it had been done by his previous authority<sup>4</sup>.

A ratification may be of one act or a series of acts; and as a general rule every act, other than one which is void at its inception<sup>5</sup>, may be ratified, whether legal or illegal, provided that it was capable of being done by the principal himself<sup>6</sup>.

The act of a public officer, such as a sheriff's officer, performed in his public capacity, is not capable of ratification by a private person<sup>7</sup>, but, where a sheriff professes and intends to act on behalf of a private individual, or a corporation, the private individual or corporation can ratify his act<sup>8</sup>.

1 See PARA 60.

2 *Simpson v Eggington* (1855) 10 Exch 845; *Webb v Ipswich Borough Council* (1989) 21 HLR 325, CA.

3 *Ancona v Marks* (1862) 7 H & N 686.

4 *Wilson v Tumman* (1843) 6 Man & G 236; *Maclean v Dunn* (1828) 1 Moo & P 761. The agent is similarly bound: see *Foster v Bates* (1843) 12 M & W 226; *Lawson (Inspector of Taxes) v Hosemaster Machine Co Ltd* [1966] 2 All ER 944, [1966] 1 WLR 1300, CA. See further, as to the effect of ratification PARA 69.

5 See *Spackman v Evans* (1868) LR 3 HL 171 (act ultra vires a company).

6 See *Firth v Staines* [1897] 2 QB 70; *Boston Deep Sea Fishing and Ice Co Ltd v Farnham (Inspector of Taxes)* [1957] 3 All ER 204, [1957] 1 WLR 1051 (principal, incapable of doing act by virtue of being an enemy alien, cannot ratify the act after cessation of enemy status). See further, as to acts capable of ratification PARAS 58-59.

7 *Wilson v Tumman* (1843) 6 Man & G 236; *Woollen v Wright* (1862) 1 H & C 554, Ex Ch.

8 *Walker v Hunter* (1845) 2 CB 324; *Carter v St Mary Abbot's, Kensington Vestry* (1900) 64 JP 548, CA.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/4. RATIFICATION/(2) ACTS CAPABLE OF RATIFICATION/58. Contract.

## **(2) ACTS CAPABLE OF RATIFICATION**

### **58. Contract.**

A contract may be ratified even though the circumstances have altered, as by a loss occurring under an unauthorised marine insurance policy<sup>1</sup>, or even when the third party has given notice of repudiation<sup>2</sup>, provided that it is ratified within a reasonable time<sup>3</sup>, and it is immaterial that the contract was made by the agent in fraud of the principal<sup>4</sup>. Where, however, the agent and third party are able to rescind their transaction so that there remains nothing to ratify, ratification by the principal is inoperative<sup>5</sup>. If the third party knows that the transaction is subject to ratification there will be no contract until ratification is communicated to him<sup>6</sup>.

The holder of a bill of exchange may avail himself of notice of dishonour by ratification of the act of another person<sup>7</sup>.

1 See the Marine Insurance Act 1906 s 86; *Hagedorn v Oliverson* (1814) 2 M & S 485; *Williams v North China Insurance Co* (1876) 1 CPD 757, CA; and **INSURANCE** vol 25 (Reissue) PARA 388. In *Grover & Grover Ltd v Mathews* [1910] 2 KB 401, it was held that in the case of non-marine insurance there could be no ratification after loss had occurred, but the point cannot be regarded as settled; see also *Byas v Miller* (1897) 3 Com Cas 39; and *Yangtze Insurance Association v Lukmanjee* [1918] AC 585, PC.

2 *Bolton Partners v Lambert* (1889) 41 ChD 295, CA. This decision has been much criticised, and Lord Lindley in *Fleming v Bank of New Zealand* [1900] AC 577, PC, expressly reserved the right of the Privy Council to consider the point; see further PARA 63 note 1. Ratification does not relate back when parties other than the co-

contracting party have acquired rights before ratification: *Re Gloucester Municipal Election Petition, 1900, Ford v Newth* [1901] 1 KB 683.

3 *Re Portuguese Consolidated Copper Mines Ltd* (1890) 45 ChD 16, CA; *Re Tiedemann and Ledermann Frères* [1899] 2 QB 66.

4 *Re Tiedemann and Ledermann Frères* [1899] 2 QB 66.

5 *Walter v James* (1871) LR 6 Exch 124 (payment to third party followed by repayment to agent by mutual agreement); *Watson v Davies* [1931] 1 Ch 455 (offer accepted by agent subject to ratification withdrawn before ratification); but see also *Hooper v Kerr, Stuart & Co* (1900) 83 LT 729 (validation by directors' meeting of issue of notice convening company meeting although directors' meeting, which was condition precedent to issue of notice, not held until after issue).

6 *Warehousing and Forwarding Co of East Africa Ltd v Jafferli & Sons Ltd* [1964] AC 1, [1963] 3 All ER 571, PC.

7 See the Bills of Exchange Act 1882 s 49(1), (2); *Chapman v Keane* (1835) 3 Ad & El 193; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1524 et seq.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/4. RATIFICATION/(2) ACTS CAPABLE OF RATIFICATION/59. Unlawful acts.

## 59. Unlawful acts.

The illegality of an act will not of itself prevent its ratification<sup>1</sup>. Where the act of the agent is tortious, for example a trespass or an assault<sup>2</sup>, the principal may ratify and become liable but only to the extent of the acts to which the ratification relates<sup>3</sup>. The act of ratification may in itself constitute a tort by the principal; for example where the tort of conversion has been committed by the agent, any act by the principal inconsistent with the title of the third party will also amount to a conversion<sup>4</sup>. Some degree of knowledge by the principal of the unlawfulness may be required; thus the receipt of money produced by an illegal distress is not a sufficient ratification of the illegal acts of the agent levying the distress, unless the principal has knowledge of the illegality<sup>5</sup>.

A principal cannot ratify a contract made by an agent if at the time it was made the principal had no power to make it himself<sup>6</sup>. A forgery is probably, being void in its inception, incapable of ratification by the person whose name is forged<sup>7</sup>. Such a person may, however, be estopped by his conduct from denying the validity of an instrument forged in his name, if he fails to disclose that the instrument is a forgery<sup>8</sup> or instructs the third party to act upon the instrument<sup>9</sup>.

The unauthorised institution of legal proceedings may also be ratified<sup>10</sup>.

1 *Hull v Pickersgill* (1819) 1 Brod & Bing 282.

2 *Eastern Counties Rly Co v Broom* (1851) 6 Exch 314.

3 *Haseler v Lemoyne* (1858) 5 CBNS 530; *Lewis v Read* (1845) 13 M & W 834; *Knight v North Metropolitan Tramways Co* (1898) 78 LT 227.

4 *Hilbery v Hatton* (1864) 2 H & C 822; see also *Barns v St Mary, Islington, Guardians* (1911) 76 JP 11 (knowledge of principal of acts of agent amounting to conversion; principal liable because of delay in denying authority of agent).

5 *Freeman v Rosher* (1849) 13 QB 780.

6 *Ashbury Railway Carriage and Iron Co v Riche* (1875) LR 7 HL 653; *Newborne v Sensolid (Great Britain) Ltd* [1954] 1 QB 45, [1953] 1 All ER 708, CA; *Boston Deep Sea Fishing and Ice Co Ltd v Farnham (Inspector of Taxes)* [1957] 3 All ER 204, [1957] 1 WLR 1051. As to the time at which capacity is needed see PARA 63; and as to the effect of contracts purporting to be made on behalf of companies but void as being ultra vires such



companies see *Ashbury Rly Carriage and Iron Co v Riche*. The ultra vires rule is modified by the Companies Act 1985 ss 35, 36C (see **COMPANIES** vol 14 (2009) PARAS 66, 263).

As to the effect of forged bills of exchange see the Bills of Exchange Act 1882 s 24; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1425.

7 *Brook v Hook* (1871) LR 6 Exch 89; but see contra *M'Kenzie v British Linen Co* (1881) 6 App Cas 82, HL. See also *Muir's Executors v Craig's Trustees* 1913 SC 349; *Morison v London County and Westminster Bank Ltd* [1914] 3 KB 356, CA; *Fung Kai Sun v Chan Fui Hing* [1951] AC 489, [1951] 2 TLR 47, PC.

8 *Greenwood v Martins Bank Ltd* [1933] AC 51, HL. See also *Morison v London County and Westminster Bank Ltd* [1914] 3 KB 356, CA (estoppel of principal where no action taken by him in respect of cheques returned to him after payment into personal account of agent; bank therefore not liable to principal despite the Bills of Exchange Act 1882 s 25 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1474)). There can be no estoppel of the principal unless the third party has relied on the conduct of the principal, for example the non-disclosure that an instrument is a forgery, to his detriment: see *McKenzie v British Linen Co* (1881) 6 App Cas 82, HL (no reliance and no contractual relationship between principal and third party); *Muir's Executors v Craig's Trustees* 1913 SC 349 (detriment caused by delay in notifying third party of irregularity). If the principal merely delays in notifying the third party that an instrument is a forgery, the third party can only recover under estoppel of the principal if the chance of recovering from the agent or elsewhere has been materially prejudiced by the delay: see *Fung Kai Sun v Chan Fui Hing* [1951] AC 489, [1951] 2 TLR 47, PC.

9 See *Welch v Bank of England (Francis and Praed, third parties)* [1955] Ch 508, [1955] 1 All ER 811 (trustee accepted explanation given by co-trustee for forging signature on a cheque and authorised the bank, which had queried the signature, to pay the cheque; trustee estopped from claiming rectification on Bank of England registers of stock transferred under other forged instruments).

10 *Ancona v Marks* (1862) 7 H & N 686; *Danish Mercantile Co Ltd v Beaumont* [1951] Ch 680, [1951] 1 All ER 925, CA (action instituted without authority in name of company ratified by liquidator).

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/4. RATIFICATION/(3) CONDITIONS OF RATIFICATION/60. Act must be on behalf of principal.

### (3) CONDITIONS OF RATIFICATION

#### 60. Act must be on behalf of principal.

As the whole hypothesis upon which ratification is based is that the person ratifying is already in appearance the contractor<sup>1</sup>, the agent must not be purporting to act for himself, but must profess to be acting on behalf of a named or ascertainable principal, and one who is actually in existence at the time when the act subsequently ratified is done<sup>2</sup>.

A contract made by one professing to act on his own behalf, though at that time he has the undeclared intention of acting on behalf of another person, cannot be ratified by that other person so as to confer on himself the status of principal and the right to sue and the liability to be sued on the contract<sup>3</sup>.

Where one person not purporting to act for another wrongfully takes property, that other cannot ratify the act so as to make himself liable in tort<sup>4</sup>.

1 See *Keighley, Maxsted & Co v Durant* [1901] AC 240, HL.

2 *Wilson v Tumman* (1843) 6 Man & G 236; *Royal Albert Hall Corpn v Lady Winchelsea* (1891) 7 TLR 362; *Marsh v Joseph* [1897] 1 Ch 213, CA; *Keighley, Maxsted & Co v Durant* [1901] AC 240, HL; *Imperial Bank of Canada v Begley* [1936] 2 All ER 367, PC.

3 *Heath v Chilton* (1844) 12 M & W 632; *Keighley Maxsted & Co v Durant* [1901] AC 240, HL; *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847, HL. Cf *Jones v Hope* (1880) 3 TLR 247, CA; and *Saunderson v Griffiths* (1826) 5 B & C 909. As to the general right to sue and the liability to be sued see PARA 125.

4 See *Wilson v Barker* (1833) 4 B & Ad 614; see also *Eastern Construction Co Ltd v National Trust Co Ltd and Schmidt* [1914] AC 197, HL (principal not liable where agents cut trees from wrong land, where no knowledge or adoptive acts by principal).

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/4. RATIFICATION/(3) CONDITIONS OF RATIFICATION/61. Principal must be in existence and capable.

### 61. Principal must be in existence and capable.

In order that the intended principal may be able effectively to ratify a contract, he must be in existence and ascertainable at the time of the act of the agent to be ratified, and be himself capable of entering into it<sup>1</sup>. If there is no such principal there can be no ratification, and the so-called agent may himself be liable on the contract<sup>2</sup>, and if so may, therefore, sue upon it<sup>3</sup>.

Contracts made in furtherance of the projects of an intended company, not actually formed, cannot be ratified by the company when it comes into existence, as the company could not have given actual authority to the agent. At common law, where the purported agent makes the agreement as agent for an intended company which has not at the time been formed, the agreement will be personally binding upon the purported agent as his own agreement<sup>4</sup> on a presumption that he must have intended to bind himself if the contract would otherwise be inoperative<sup>5</sup>; the purported agent may then sue and be sued on the agreement<sup>6</sup>. Where, however, the purported agent does not make the agreement as agent, but the unformed company purports to be the contracting party whose contract is merely authenticated by the signature of an agent<sup>7</sup>, such as a director, there is no contract in existence at common law upon which either party can sue<sup>8</sup>. By statute, however, where a contract purports to be made on or after 1 January 1973<sup>9</sup> by a company, or by a person as agent for a company, then subject to any agreement to the contrary the contract is to have effect as a contract entered into by the person purporting to act for the company or as agent for it, and he will be personally liable on it accordingly<sup>10</sup>. The effect of these provisions<sup>11</sup> is to allow the agent to enforce the contract against the third party, unless such enforcement is precluded by ordinary common law principles<sup>12</sup>. There may, however, always be evidence that the company after formation has entered into a new contract<sup>13</sup>.

1 *Watson v Swann* (1862) 11 CBNS 756; *Foster v Bates* (1843) 12 M & W 226; *Boston Deep Sea Fishing and Ice Co Ltd v Farnham (Inspector of Taxes)* [1957] 3 All ER 204, [1957] 1 WLR 1051. As to the position with regard to children's contracts see PARA 5; the Minors' Contracts Act 1987; and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 14.

2 If the agent is not personally liable on the contract, he may be liable in damages on a breach of warranty of authority: see further PARAS 160-161.

3 *Harper & Co v Vigers Bros* [1909] 2 KB 549.

4 *Kelner v Baxter* (1866) LR 2 CP 174; *Re Empress Engineering Co* (1880) 16 ChD 125, CA; *Re Northumberland Avenue Hotel Co Ltd* (1885) 33 ChD 16 (affd (1886) 33 ChD 16, CA); *Star Corn Millers' Society v W Moore & Co* (1886) 2 TLR 751, CA; *North Sydney Investment and Tramway Co v Higgins* [1899] AC 263, PC; *Natal Land and Colonization Co Ltd v Pauline Colliery and Development Syndicate Ltd* [1904] AC 120, PC. As to the liability, apart from ratification, of a company which has benefited under the contract of its promoters, see *Touche v Metropolitan Railway Warehousing Co* (1871) 6 Ch App 671; *Preston v Liverpool, Manchester, etc Rly Co (Proprietors)* (1856) 5 HL Cas 605; *Re English and Colonial Produce Co Ltd* [1906] 2 Ch 435, CA; *Earl of Shrewsbury v North Staffordshire Rly Co* (1865) LR 1 Eq 593. As to the position of a company in relation to contracts made before formation, and as to the liability of a company to its promoters and of the promoters to third parties, see further **COMPANIES** vol 14 (2009) PARAS 279-281.

5 *Kelner v Baxter* (1866) LR 2 CP 174.

6 *Kelner v Baxter* (1866) LR 2 CP 174; see also *Newborne v Sensolid (Great Britain) Ltd* [1954] 1 QB 45, [1953] 1 All ER 708, CA.

7 See *Newborne v Sensolid (Great Britain) Ltd* [1954] 1 QB 45, [1953] 1 All ER 708, CA.

8 *Newborne v Sensolid (Great Britain) Ltd* [1954] 1 QB 45, [1953] 1 All ER 708, CA.

9 le the date on which the United Kingdom entered into the European Communities.

10 See the Companies Act 1985 s 36C (replacing the European Communities Act 1972 s 9(2) (repealed)); and **COMPANIES** vol 14 (2009) PARA 66. This is so even if both parties to the contract knew that the company had not been formed: *Phonogram Ltd v Lane* [1982] QB 938, [1981] 3 All ER 182, CA. As to the application of the Companies Act 1985 s 36C to companies incorporated outside the United Kingdom see the Foreign Companies (Execution of Documents) Regulations 1994, SI 1994/950; and **COMPANIES** vol 14 (2009) PARAS 282, 288.

Note that, as from a day to be appointed, the Companies Act 1985 is repealed and replaced by the Companies Act 2006: at the date at which this volume states the law no such day had been appointed.

11 le the Companies Act 1985 s 36C (see note 10).

12 *Braymist Ltd v Wise Finance Co Ltd* [2002] EWCA Civ 127, [2002] Ch 273, [2002] 2 All ER 333; *Gibson v Imperial Homes and Developments Ltd* [2002] All ER (D) 367 (Feb).

13 See *Howard v Patent Ivory Manufacturing Co* (1888) 38 ChD 156; *Bridgetown Co-operative Society v Whelan* [1917] 2 IR 39.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/4. RATIFICATION/(3) CONDITIONS OF RATIFICATION/62. Principal must have been ascertainable.

## 62. Principal must have been ascertainable.

A ratification, to be effective, must be by the person for whom the act was professedly done or his personal representative<sup>1</sup>. The person ratifying need not necessarily have been a named individual at the time when the act was done, but must have been ascertainable<sup>2</sup>. A person entitled to the reversion of an estate may ratify the agency of one who has been professedly receiving the rents for the right owner<sup>3</sup>.

1 *Whitehead v Taylor* (1839) 10 Ad & El 210; *Foster v Bates* (1843) 12 M & W 226.

2 *Hagedorn v Oliverson* (1814) 2 M & S 485; *Boston Fruit Co v British and Foreign Marine Insurance Co* [1906] AC 336, HL; see *Purcell v Henderson* (1885) 16 LR Ir 213, 466. See also *Lawson (Inspector of Taxes) v Hosemaster Machine Co Ltd* [1966] 2 All ER 944, [1966] 1 WLR 1300, CA (ratification by subsequent receiver under debentures effective in respect of acts during management by first receiver).

3 *Lyell v Kennedy* (1889) 14 App Cas 437, HL.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/4. RATIFICATION/(3) CONDITIONS OF RATIFICATION/63. Time for ratification.

## 63. Time for ratification.

Ratification, to be effective, must be made either within a period fixed by the nature of the particular case, or within a reasonable time, after which an act cannot be ratified to the prejudice of a third person<sup>1</sup>. Ratification cannot be made so as to divest persons not parties to the contract ratified of their rights or otherwise prejudicially to affect those rights, where such rights have vested prior to the purported ratification<sup>2</sup>, or so as prejudicially to affect the rights of persons such as assignees in bankruptcy claiming through parties to the contract<sup>3</sup>. Thus an unauthorised notice to quit can only be ratified by the landlord within the period for giving

notice<sup>4</sup>; the payment of a debt to a creditor of another cannot be ratified after the money has been returned to the unauthorised agent<sup>5</sup>; an unauthorised stoppage in transit cannot be ratified after the transit is ended<sup>6</sup>; and the exercise of an option must be ratified within the time for which the option was open<sup>7</sup>.

An unauthorised demand for payment of a debt by the creditor's agent cannot, after tender by the debtor, be ratified so as to defeat the plea of tender, unless the agent had implied authority to receive the debt and give a discharge<sup>8</sup>. An ineffectual notice of abandonment of a ship given by a mere pledgee by way of deposit of a policy of insurance on the ship is not validated by ratification by the owner<sup>9</sup>.

1 Ratification has, however, been held effective after a purported revocation of an offer by the third party: see *Bolton Partners v Lambert* (1889) 41 ChD 295, CA. The court decided the case on the basis that ratification is retrospective and could, in general, be valid in all cases where it did not involve divesting a vested estate; as to vested estates see the text to note 2. Ratification was not permitted so as to entitle the principal to sue, however, in *Kidderminster Corp v Hardwick* (1873) LR 9 Exch 13, where the third party failed to meet a condition as to sureties, required for the making of the contract, and eventually withdrew from the agreement before the purported ratification. This case was not considered in *Bolton Partners v Lambert*, but might there have been distinguishable on the ground that the condition as to the sureties was a condition precedent to any agreement and that there was therefore nothing capable of ratification until the condition had been met. As to criticism of *Bolton Partners v Lambert* see PARA 58 note 2.

The limitations of this principle were extensively discussed in *Presentaciones Musicales SA v Secunda* [1994] Ch 271, [1994] 2 All ER 737, CA, though there are significant differences between the judgments of Dillon LJ (with whom Nolan LJ agreed) and that of Roch LJ. As to ratification of writ issued without authority, after expiry of limitation period, see *Presentaciones Musicales SA v Secunda*. As to ratification of an insurance policy after a loss has occurred see PARA 58. As to the retrospective effect of a valid ratification see further PARA 69.

In *Johnson Matthey & Co Ltd v Constantine Terminals Ltd* [1976] 2 Lloyd's Rep 215 it was held that in certain circumstances a sub-bailee could invoke protective terms in the sub-bailment against the principal bailor. In *KH Enterprises (Cargo Owners) v Pioneer Container (Owners), The Pioneer Container* [1994] 2 AC 324, [1994] 2 All ER 250, PC, Lord Goff of Chieveley held that the doctrine of ratification was not an appropriate way of rationalising this decision. If the principal bailor were to be bound, there had to be actual or ostensible authority to sub-bail on the terms in question.

2 *Donnelly v Popham* (1807) 1 Taunt 1; *Re Gloucester Municipal Election Petition (1900)*, *Ford v Newth* [1901] 1 KB 683; and see *Presentaciones Musicales SA v Secunda* [1994] Ch 271, [1994] 2 All ER 737, CA.

3 *Bird v Brown* (1850) 4 Exch 786.

4 *Doe d Mann v Walters* (1830) 10 B & C 626; and see *Right d Fisher, Nash and Hyrons v Cuthell* (1804) 5 East 491; *Doe d Lyster v Goldwin* (1841) 2 QB 143.

5 *Walter v James* (1871) LR 6 Exch 124; *Lucas v Wilkinson* (1856) 1 H & N 420.

6 *Bird v Brown* (1850) 4 Exch 786. See also *Lord Audley v Pollard* (1597) Cro Eliz 561.

7 *Dibbins v Dibbins* [1896] 2 Ch 348. See also *Holland v King* (1848) 6 CB 727; *Managers of the Metropolitan Asylums Board v Kingham & Sons* (1890) 6 TLR 217; *Morrell v Studd and Millington* [1913] 2 Ch 648.

8 *Coles v Bell* (1808) 1 Camp 478n; *Coore v Callaway* (1794) 1 Esp 115.

9 *Jardine v Leathley* (1863) 3 B & S 700. As to ratification of contracts of marine insurance, however, see PARA 58 note 1.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/4. RATIFICATION/(3) CONDITIONS OF RATIFICATION/64. Ratification must not be partial.

#### **64. Ratification must not be partial.**

A contract cannot be ratified in part and repudiated in part; if ratified, the whole contract must be ratified, and the agency accepted with all its obligations<sup>1</sup>. Ratification of one of a series of acts constituting one transaction operates as a ratification of the entire transaction<sup>2</sup>.

1 *Hovil v Pack* (1806) 7 East 164 per Lord Ellenborough; *Wilson v Poulter* (1730) 2 Stra 859. See also *Union Bank of Australia Ltd v McClintock* [1922] 1 AC 240, PC (ratification of unauthorised obtaining of bank drafts by manager of business must include ratification of subsequent dealings with drafts), applied in *Commercial Banking Co of Sydney Ltd v Mann* [1961] AC 1, [1960] 3 All ER 482, PC; *Re Mawcon Ltd* [1969] 1 All ER 188, [1969] 1 WLR 78 (liquidator held to have ratified a debt by adopting the transaction in which it was incurred).

2 *Rodmell v Eden* (1859) 1 F & F 542; *Walter v James* (1871) LR 6 Exch 124. Cf, however, *Harrisons and Crossfield Ltd v London and North Western Rly Co* [1917] 2 KB 755, where carriers who had prosecuted for larceny a servant who had by a false pretence obtained goods and disposed of them, laying the property in the goods in themselves, were held to have ratified only a bare bailment and not possession of the goods for purposes of carriage.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/4. RATIFICATION/(4) MANNER OF RATIFICATION/65. In general.

## **(4) MANNER OF RATIFICATION**

### **65. In general.**

A ratification may be express, whether in writing or oral, or may be implied from conduct<sup>1</sup>. A claim by a principal on a voidable contract entered into by an agent without authority<sup>2</sup> or a pleading relying on the efficacy of an unauthorised act<sup>3</sup> is an adoption of the agency. The execution of a deed by an agent without authority, however, can only be ratified by deed or by matter of record<sup>4</sup>.

1 *Maclean v Dunn* (1828) 1 Moo & P 761; *Fitzmaurice v Bayley* (1860) 9 HL Cas 78; *Soames v Spencer* (1822) 1 Dow & Ry KB 32. Even where a contract was unenforceable unless evidenced by a note or memorandum in writing, it was not necessary that the ratification should be in writing. As to ratification by acquiescence see further PARA 68.

2 *Lacey v Walrond* (1837) 6 LJCP 290.

3 *Belshaw v Bush* (1851) 11 CB 191.

4 *Hunter v Parker* (1840) 7 M & W 322; *Tupper v Foulkes* (1861) 9 CBNS 797; *Oxford Corpn v Crow* [1893] 3 Ch 535.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/4. RATIFICATION/(4) MANNER OF RATIFICATION/66. Essentials of ratification.

### **66. Essentials of ratification.**

Ratification must be evidenced either by clear adoptive acts<sup>1</sup>, or by acquiescence equivalent thereto<sup>2</sup>. The act or acts of adoption or acquiescence must be accompanied by full knowledge of all the essential facts<sup>3</sup>, and must relate to a transaction to which effect can be given<sup>4</sup>, unless the principal shows an intention to take all risks<sup>5</sup>, but it is not necessary that he should know the legal effect of the act ratified<sup>6</sup>. A mere act of repudiation of the act of the intended agent by the principal does not in itself, and apart from any conduct which it may have induced in any third person, estop the principal from subsequently adopting or ratifying the agent's act<sup>7</sup>.

1 *Lythgoe v Vernon* (1860) 5 H & N 180; *Smith v Baker* (1873) LR 8 CP 350. As to what will amount to such an adoptive act see *Brewer and Gregory v Sparrow* (1827) 7 B & C 310; *Valpy v Sanders* (1848) 5 CB 886; *Moon v Towers* (1860) 8 CBNS 611; and PARA 67. A principal cannot be said to adopt an act when he cannot help himself; see *Re Becket, Purnell v Paine* [1918] 2 Ch 72, CA; *Barrett v Irvine* [1907] 2 IR 462, CA (where negotiation for settlement by the parent of a minor who in purchasing a horse had misrepresented himself as the parent's agent was held not to be ratification); and see *Forman & Co Pty Ltd v The Liddesdale* [1900] AC 190, PC; and PARA 68. In *Morison v London County and Westminster Bank Ltd* [1914] 3 KB 356, CA, continuance of employment of a dishonest servant after discovery of his dishonesty and conversion of his discovered defalcations into an ordinary debt were held to be adoptive acts; but on this point the decision has been questioned as inconsistent with *Bank of Ireland v Evans' Charities Trustees in Ireland* (1855) 5 HL Cas 389; and *Swan v North British Australasian Co* (1863) 2 H & C 175; see *Lloyds Bank Ltd v Chartered Bank of India, Australia and China* [1929] 1 KB 40, CA.

2 See PARA 68.

3 *Savery v King* (1856) 5 HL Cas 627; *Haseler v Lemoyne* (1858) 5 CBNS 530; *Gunn v Roberts* (1874) LR 9 CP 331; and see *Marsh v Joseph* [1897] 1 Ch 213, CA; *Morison v London County and Westminster Bank Ltd* [1914] 3 KB 356, CA (knowledge of auditors employed to examine principal's business books held to be knowledge of principal); *Deveney v Crampsey* [1969] SCR 267, Can SC (silence and inactivity by some joint tenants during negotiations for sale by other joint tenants, evidence rather of ignorance of rights than of approval; no ratification; joint tenant not in any event purporting to act as agent).

4 *Banque Jacques-Cartier v Banque d'Epargne de Montreal* (1887) 13 App Cas 111, PC; *Foligno v Martin* (1852) 22 LJ Ch 502; *Jackson v Jacob* (1837) 3 Bing NC 869; *Munnings v Bury* (1829) Taml 147.

5 *Brewer and Gregory v Sparrow* (1827) 7 B & C 310 (where the assignees of a bankrupt affirmed the acts of a person wrongfully selling property, they could not afterwards treat him as a wrongdoer and claim in conversion against him); *Haseler v Lemoyne* (1858) 5 CBNS 530. Cf *Valpy v Sanders* (1848) 5 CB 886 (assignees in bankruptcy could make affirmation of wrongful sale conditional on payment by buyer of price, and on buyer's refusal to pay could repudiate the unauthorised acts and sue in trover).

6 *Powell v Smith* (1872) LR 14 Eq 85; *Lewis v Read* (1845) 13 M & W 834; *Fitzmaurice v Bayley* (1856) 6 E & B 868 (revsd on another point (1860) 9 HL Cas 78); *Hilbery v Hatton* (1864) 2 H & C 822.

7 *Simpson v Eggington* (1855) 10 Exch 845; *Soames v Spencer* (1822) 1 Dow & Ry KB 32.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/4. RATIFICATION/(4) MANNER OF RATIFICATION/67. Evidence of ratification.

## 67. Evidence of ratification.

The receipt of purchase money is generally sufficient evidence of ratification of a sale, but not if it is received in ignorance of the true facts<sup>1</sup>. If the act alleged to be ratified is a fraudulent act, full knowledge and unequivocal adoption thereafter must be proved, or the circumstances of the alleged ratification must be such as to warrant the clear inference that the principal was adopting the agent's acts whatever they were and however culpable<sup>2</sup>. In a case of alleged false imprisonment where a servant of a railway company took a passenger into custody for an alleged breach of a byelaw, the fact that the company's solicitor attended to prosecute before the magistrate was not a ratification of the servant's acts<sup>3</sup>. The assignment by the principal of the benefit of a contract entered into by the agent without authority is a ratification of that contract<sup>4</sup>.

1 *The Bonita, The Charlotte* (1861) 5 LT 141; *Freeman v Rosher* (1849) 13 QB 780. See also *Cornwal v Wilson* (1750) 1 Ves Sen 509.

2 *Marsh v Joseph* [1897] 1 Ch 213, CA.

3 *Eastern Counties Rly Co v Broom* (1851) 6 Exch 314; but see *Carter v St Mary Abbots, Kensington Vestry* (1900) 64 JP 548, CA. A corporation will be liable, however, if its officials, purporting to act under a byelaw, make a mistake either of fact or of law which leads them to arrest wrongfully: *Percy v Glasgow Corpn* [1922] 2 AC 299, HL; *Moore v Metropolitan Rly Co* (1872) LR 8 QB 36; *Goff v Great Northern Rly Co* (1861) 30 LQB 148.

4 *Thompson v Hickman* [1907] 1 Ch 550.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/4. RATIFICATION/(4) MANNER OF RATIFICATION/68. Ratification by acquiescence.

## 68. Ratification by acquiescence.

Although a ratification must be clear and must bear distinct reference to the facts of the particular case, it need not necessarily be proved by positive acts of adoption. In certain cases it is sufficient evidence of ratification that the intended principal, having all material facts brought to his knowledge and knowing that he is being regarded as having accepted the position of principal, takes no steps to disown that character within a reasonable time, or adopts no means of asserting his rights at the earliest time possible<sup>1</sup>.

Like acts of adoption, acquiescence cannot avail when the contract or act is made or done before the alleged principal came into existence<sup>2</sup>, even where such principal has derived advantage from the services rendered<sup>3</sup>.

The acquiescence must be acquiescence in the particular facts and be incapable of referring to another set of facts<sup>4</sup>. Acts which the principal has no choice but to perform will not of themselves amount to ratification<sup>5</sup>.

Acquiescence is stronger evidence of ratification where the relationship of principal and agent previously existed between the parties, and the act to be ratified was rather one in excess of the agent's authority than one which was totally unauthorised<sup>6</sup>. Thus, where a shipmaster who was entrusted with the sale of goods, the proceeds to be devoted to particular purchases, devoted the proceeds to other purchases and advised his employer thereof, it was held that the fact that there was no repudiation by the employer within a reasonable time was evidence that he assented to and ratified the shipmaster's conduct<sup>7</sup>.

1 *The Australia* (1859) 13 Moo PCC 132; *Jackson v Jacob* (1837) 3 Bing NC 869; *Banque Jacques-Cartier v Banque d'Epargne de Montreal* (1887) 13 App Cas 111, PC; *Robinson v Gleadow* (1835) 2 Bing NC 156; *Hall v Laver* (1842) 1 Hare 571. The burden of proving such ratification rests on the person alleging it, who must also prove full knowledge of facts: *Wall v Cockerell* (1863) 10 HL Cas 229. See also *Morison v London County and Westminster Bank Ltd* [1914] 3 KB 356, CA.

2 See PARA 61.

3 *Re Rotherham Alum and Chemical Co* (1883) 25 ChD 103, CA.

4 *De Bussche v Alt* (1878) 8 ChD 286, CA; *Powell and Thomas v Evan Jones & Co* [1905] 1 KB 11, CA.

5 Thus, where the agent of a shipowner contracted for repairs in excess of his authority, the fact that the owner took his own ship as repaired and sold it did not amount to acquiescence: *Forman & Co Pty Ltd v The Liddesdale* [1900] AC 190, PC.

6 *Sentance v Hawley* (1863) 13 CBNS 458; *Benham v Batty* (1865) 6 New Rep 42; *Waithman v Wakefield* (1807) 1 Camp 120; *The Australia* (1859) 13 Moo PCC 132; *Allard v Bourne* (1863) 15 CBNS 468; *Smith v Hull Glass Co* (1852) 11 CB 897; *Pott v Bevan* (1844) 1 Car & Kir 335; *Bank Melli Iran v Barclays Bank (Dominion, Colonial and Overseas)* [1951] 2 TLR 1057, [1951] 2 Lloyd's Rep 367.

7 *Prince v Clark* (1823) 1 B & C 186; *Sentance v Hawley* (1863) 13 CBNS 458 (principal found to have acquiesced in a reasonable custom of brokers); *Fothergill v Phillips* (1871) 6 Ch App 770 (where one tenant in common entered into negotiations for sale, and the other, who allowed them to go on for three years without

dissenting, knowing that the mortgagee was threatening to foreclose unless the sale took place, was held too late to allege absence of authority). See also *Bigg v Strong* (1858) 32 LTOS 98, CA (agreement for sale of land by son on behalf of self and father: father who had full knowledge of agreement within a few days of signing held to have ratified, so that agreement specifically enforceable against father and son).

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/4. RATIFICATION/(5) EFFECT OF RATIFICATION/69. General effect.

## (5) EFFECT OF RATIFICATION

### 69. General effect.

An effective ratification places all the parties in a position similar to that which they would have occupied at the material time if the agent had had actual authority to perform the acts ratified. This is expressed by the maxim *omnis ratihabitio retrotrahitur et mandato priori aequiparatur*<sup>1</sup>.

Where a contract is ratified, the agent is relieved from personal liability to his principal for acting in excess of his authority<sup>2</sup>, and may recover his commission and expenses<sup>3</sup>. The principal must perform the contract made by the agent in its entirety<sup>4</sup>; and the agent is relieved from personal liability to the other contracting party for breach of warranty of authority, the only remedy of that party being against the principal, unless the agent so contracted as to make himself additionally liable<sup>5</sup>.

Where the act ratified is tortious, the agent remains liable for the tort, but the principal will also become liable<sup>6</sup>, unless the act is only wrongful because of lack of authority, in which case it will be justified by the ratification<sup>7</sup>. It is no justification for the commission of a tortious act that the wrongdoer is acting under another's authority, unless that other can justify the alleged wrong<sup>8</sup>.

Ratification by a principal of one act done by an agent in excess of his authority does not extend the agent's authority so as to authorise him to do similar acts in future<sup>9</sup>.

1    le 'Every ratification of an act already done has a retrospective effect, and is equivalent to a previous request to do it': Co Litt 207a; *Maclean v Dunn* (1828) 1 Moo & P 761; *Bolton Partners v Lambert* (1889) 41 ChD 295 at 302, CA; *Firth v Staines* [1897] 2 QB 70; *R v Chapman, ex p Arlidge* [1918] 2 KB 298; *Koenigsblatt v Sweet* [1923] 2 Ch 314, CA; *Lawson (Inspector of Taxes) v Hosemaster Machine Co Ltd* [1966] 2 All ER 944, [1966] 1 WLR 1300, CA. This principle has been used by the courts to permit a ratification after the third party has purported to revoke his offer: see *Bolton Partners v Lambert*; and PARA 63.

2    *Smith v Cologan* (1788) 2 Term Rep 188n; *Risbourg v Bruckner* (1858) 3 CBNS 812 (foreign principal); *Hartas v Ribbons* (1889) 22 QBD 254, CA; *Clarke v Perrier* (1679) Freem Ch 48.

3    *Keay v Fenwick* (1876) 1 CPD 745, CA; *Mason v Clifton* (1863) 3 F & F 899; *Cornwal v Wilson* (1750) 1 Ves Sen 509; *Frixione v Tagliaferro & Sons* (1856) 10 Moo PCC 175; *Gleadow v Hull Glass Co* (1849) 19 LJ Ch 44 (directors of a company entitled to indemnity).

4    *Bristow v Whitmore* (1861) 9 HL Cas 391.

5    *Spittle v Lavender* (1821) 2 Brod & Bing 452.

6    *Stephens v Elwall* (1815) 4 M & S 259; *Hilbery v Hatton* (1864) 2 H & C 822; *Perkins v Smith* (1752) 1 Wils 328; *Heugh v Earl of Abergavenny and Delves* (1874) 23 WR 40.

7    *Anon* (1406) YB 7 Hen 4 fol 34 pl 1; *Anon* (1586) Godb 109; see also *Whitehead v Taylor* (1839) 10 Ad & El 210.

8    *Stephens v Elwall* (1815) 4 M & S 259.

9    *Irvine v Union Bank of Australia* (1877) 2 App Cas 366, PC.



Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/4. RATIFICATION/(5) EFFECT OF RATIFICATION/70. Ratification by the Crown.

## **70. Ratification by the Crown.**

The ratification by the Crown of a purported exercise of sovereign power abroad against an alien by a public official in excess of his authority makes the act of such official an act of state in respect of which there is no legal remedy against either the official or the Crown<sup>1</sup>. However, the protection afforded by the Crown to those within the realm who owe allegiance (and who therefore could be guilty of acts of treason), means that such conduct committed against an alien<sup>2</sup> resident in British territory, who is a subject of a friendly state, or who is a British subject<sup>3</sup>, cannot by purported ratification be justified as an act of state<sup>4</sup>.

1 *Buron v Denman* (1848) 2 Exch 167; *Secretary of State in Council for India v Kamachee Boye Sahaba* (1859) 7 Moo Ind App 476, PC; *Salaman v Secretary of State for India* [1906] 1 KB 613, CA. As to state responsibility see **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARA 327 et seq.

2 As to the status of aliens see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARA 13.

3 As to the status of a British subject see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARAS 9, 66-71.

4 See *Johnstone v Pedler* [1921] 2 AC 262, HL.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/5. RELATIONS BETWEEN PRINCIPAL AND AGENT/(1) IN GENERAL/71. Rights and duties.

## **5. RELATIONS BETWEEN PRINCIPAL AND AGENT**

### **(1) IN GENERAL**

#### **71. Rights and duties.**

At common law the rights and duties arising out of the relation of principal and agent are to be ascertained by reference to the contract, express or implied, which subsists between them<sup>1</sup>. This statement must, however, be modified in relation to those cases where the Commercial Agents (Council Directive) Regulations 1993<sup>2</sup> apply. Those regulations restrict to some extent the parties' freedom of contract<sup>3</sup>.

The mere existence of the relation raises the implication of a contract involving certain rights and duties, the nature and extent of which depend upon the circumstances of the particular case<sup>4</sup>, and the parties, in entering upon the relation, may leave the incidents arising out of it to be determined wholly by reference to the rights and duties so implied<sup>5</sup>.

Where, however, the parties have defined their position by an express contract (subject to the Commercial Agents (Council Directive) Regulations)<sup>6</sup>, the incidents of their relation depend upon their contract, as legally construed<sup>7</sup>, subject nevertheless to such of the rights and duties implied by law as are not clearly excluded by express words or by necessary implication<sup>8</sup>. A term will not be implied merely because it is reasonable; it must necessarily be implied in the nature of the contract<sup>9</sup>.

A contract of agency, being in the nature of a contract for personal services, will not be specifically enforced at the suit of either party<sup>10</sup>, but an injunction may be granted to restrain a breach of such a contract<sup>11</sup>.

1 *Love v Mack* (1905) 93 LT 352, CA; *Pole v Leask* (1863) 33 LJ Ch 155, HL.

2 *le the Commercial Agents (Council Directive) Regulations 1993*, SI 1993/3053 (amended by SI 1998/2868). As to the cases where those Regulations apply see PARA 72.

3 See PARA 72. The effect of the regulations is noted as relevant in the following paragraphs.

4 See PARA 74 et seq; and see *Shaw v Woodcock* (1827) 7 B & C 73, where the facts raised an inference of a del credere agency (as to which see PARA 13).

5 As to agency by necessity see PARA 24. As to the implication of reasonable usages see PARA 44.

6 See note 2.

7 *Bull v Price* (1831) 7 Bing 237; *Kofi Sunkersette Obu v A Strauss & Co Ltd* [1951] AC 243, PC.

8 See *Graham v Ackroyd* (1852) 10 Hare 192, where a del credere agent was held not to be entitled to reimbursement in respect of matters covered by his agency; and cf *Hooper v Treffry* (1847) 1 Exch 17, where the reimbursement claimed and upheld was outside the del credere agency. As to the implication of reasonable usages where not inconsistent with the contract see PARA 44.

9 *Lazarus v Cairn Line of Steamships Ltd* (1912) 106 LT 378; *Shackleton Aviation Ltd v Maitland Drewery Aviation Ltd* [1964] 1 Lloyd's Rep 293.

10 *White v Bobby* (1877) 37 LT 652, CA. The rule that a contract for personal services will not be the subject of a decree of specific performance is not an absolute one, which is not subject to exceptions, but there are instances, for example, where a single act is required to be procured, as in the case of the execution of a document, where such an order would be made: *CH Giles & Co Ltd v Morris* [1972] 1 All ER 960, [1972] 1 WLR 307. See also **SPECIFIC PERFORMANCE** vol 44(1) (Reissue) PARAS 806-807, 811.

11 *Mutual Reserve Fund Life Association v New York Life Insurance Co* (1896) 75 LT 528, CA. Cf *Chapman v Westerby* [1913] WN 277.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/5. RELATIONS BETWEEN PRINCIPAL AND AGENT/(1) IN GENERAL/72. Commercial agents.

## 72. Commercial agents.

The freedom of contract as between principal and agent is to some extent restricted in the case of commercial agents<sup>1</sup>. For this purpose a 'commercial agent' is a self-employed intermediary<sup>2</sup> who has continuing authority<sup>3</sup> to negotiate the sale or purchase of goods on behalf of another person (the 'principal'), or to negotiate the sale and purchase of goods on behalf of and in the name of that principal<sup>4</sup>. This definition does not, however, include:

- 19 (1) a person who, in his capacity as an officer of a company or association, is empowered to enter into commitments binding on that company or association<sup>5</sup>;
- 20 (2) a partner who is lawfully authorised to enter into commitments binding on his partners<sup>6</sup>; or
- 21 (3) a person who acts as an insolvency practitioner<sup>7</sup> or the equivalent in any other jurisdiction<sup>8</sup>.

The Regulations also do not apply to persons whose activities as commercial agents are to be considered secondary<sup>9</sup> or to:

- 22 (a) commercial agents whose activities are unpaid<sup>10</sup>;
- 23 (b) commercial agents when they operate on commodity exchanges or in the commodity market<sup>11</sup>; and
- 24 (c) the Crown Agents for Overseas Governments and Administrations<sup>12</sup> or its subsidiaries<sup>13</sup>.

The Regulations, like the European Directive they implement<sup>14</sup>, apply where an agent's operations take effect within the European Union on behalf of a principal situated outside the European Union<sup>15</sup>. This cannot be overridden by a choice of law purporting to choose the law of a non-EU jurisdiction<sup>16</sup>.

1 le by virtue of the Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053 (amended by SI 1998/2868) (implementing EC Council Directive 86/653 (OJ L382, 31.12.86, p 17), on the co-ordination of the laws of the member states relating to self-employed commercial agents).

2 This term includes both legal and natural persons: *Bell Electric Ltd v Aweco Appliance Systems GmbH* [2002] EWHC 872 (QB), [2002] CLC 1246; affd on other grounds [2002] EWCA Civ 1501, [2003] 1 All ER 344.

3 The authority to negotiate successive extensions to a contract amounts to 'continuing authority': see Case C-3/04 *Poseidon Chartering BV v Marianne Zeeschipp VOF* [2006] 2 Lloyd's Rep 105, ECJ.

4 Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, art 2(1). See *Mercantile International Group plc v Chuan Soon Huat Industrial Group plc* [2001] 2 All ER (Comm) 632; affd [2002] EWCA Civ 288, [2002] 1 All ER (Comm) 788. Although there is no express reference to a contract in the Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, art 2(1), there is nothing to suggest that a contract is not required in order to qualify as a commercial agent for these purposes: see *Light v Ty Europe Ltd* [2003] EWCA Civ, [2004] 1 Lloyd's Rep 693.

5 Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, art 2(1)(i).

6 Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, art 2(1)(ii).

7 le as that expression is defined in the Insolvency Act 1986 s 388 (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 43): Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, art 2(1)(iii).

8 Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, art 2(1)(iii). See also *AMB Imballaggi Plastici SRL v Pacflex Ltd* [1999] 2 All ER (Comm) 249.

9 Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 2(4). The activities of a person as a commercial agent are to be considered 'secondary' where it may reasonably be taken that the primary purpose of the arrangement is other than:

- 1 (1) that the business of the principal is the sale, or as the case may be purchase, of goods of a particular kind (reg 2(3), Schedule paras 1, 2(a)); and
- 2 (2) that the goods concerned are such that transactions are normally individually negotiated and concluded on a commercial basis and procuring a transaction on one occasion is likely to lead to further transactions in those goods with that customer on future occasions, or to transactions in those goods with other customers in the same geographical area or among the same group of customers, and that accordingly it is in the commercial interests of the principal in developing the market in those goods to appoint a representative to such customers with a view to the representative devoting effort, skill and expenditure from his own resources to that end (Schedule para 2(b)).

The effect of this is that estate agents are thus excluded, because they do not deal in goods, though they are subject to specific regulation (see PARAS 239-281).

The following are indications that an arrangement falls within the scope of heads (1) and (2) above, and the absence of any of them is an indication to the contrary:

- 3 (a) the principal is the manufacturer, importer or distributor of goods (Schedule para 3(a));

- 4 (b) the goods are specifically identified with the principal in the market in question rather than, or to a greater extent than, with any other person (Schedule para 3(b));
- 5 (c) the agent devotes substantially the whole of his time to representative activities (whether for one principal or for a number of principals whose interests are not conflicting) (Schedule para 3(c));
- 6 (d) the goods are not normally available in the market in question other than by means of the agent (Schedule para 3(d)); and
- 7 (e) the arrangement is one described as one of commercial agency (Schedule para 3(e)).

The following are indications that an arrangement does not fall within the scope of heads (1) and (2) above:

- 8 (i) promotional material is supplied direct to potential customers (Schedule para 4(a));
- 9 (ii) persons are granted agencies without reference to existing agents in a particular area or in relation to a particular group (Schedule para 4(b)); and
- 10 (iii) customers normally select goods for themselves and merely place their orders through the agent (Schedule para 4(c)).

The activities of mail order catalogue agents for consumer goods, and consumer credit agents, are presumed not to fall within the scope of heads (1) and (2) above, unless the contrary is established: Schedule para 5.

As to the legitimacy of reg 2(3), (4) in implementing EC Council Directive 86/653 (OJ L382, 31.12.86, p 17), and as to the interpretation of these provisions generally, see *Crane v Sky In-Home Service Ltd* [2007] EWHC 66 (Ch), [2007] 2 All ER (Comm) 599. See also *Tamarind International Ltd v Eastern Natural Gas (Retail) Ltd* [2000] 26 LS Gaz R 35, (2000) Times, 27 June.

10 Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 2(2)(a). Payment by commission is not essential: see *Mercantile International Group plc v Chuan Soon Huat Industrial Group plc* [2001] 2 All ER (Comm) 632; affd [2002] EWCA Civ 288, [2002] 1 All ER (Comm) 788.

11 Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 2(2)(b).

12 As set up under the Crown Agents Act 1979. As to the constitution of the Crown Agents see now the Crown Agents Act 1995; the Crown Agents Act 1995 (Appointed Day) Order 1997, SI 1997/1139; the Crown Agents Act 1995 (Successor Company) Order 1997, SI 1997/1140; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 461.

13 Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 2(2)(c).

14 See note 1.

15 See Case C-381/98 *Ingmar GB Ltd v Eaton Leonard Technologies Ltd* [2001] 1 All ER (Comm) 329, [2001] 2 All ER (EC) 57, ECJ.

16 See Case C-381/98 *Ingmar GB Ltd v Eaton Leonard Technologies Ltd* [2001] 1 All ER (Comm) 329, [2001] 2 All ER (EC) 57, ECJ.

## UPDATE

### 72 Commercial agents

NOTE 4--An agent with authority to contract, as opposed to authority to negotiate, is only a commercial agent for the purpose of Directive 86/653 if he has authority to contract, and does contract, in the name of the principal as well as on its behalf: *Sagal (t/a Bunz UK) v Atelier Bunz GMBH* [2009] EWCA Civ 700, [2009] 4 All ER 1253.

### 73. Fiduciary nature of relation.

The relationship of agency is of a fiduciary nature<sup>1</sup>. In some cases, commonly where property or money has been placed in the hands of the agent for a specific purpose, the agent becomes a trustee for his principal<sup>2</sup>. In all cases the agent<sup>3</sup> owes duties of a fiduciary character to the principal, for example to keep accounts<sup>4</sup>, to disclose any conflict of interest<sup>5</sup> and not to receive any secret commission or bribe<sup>6</sup>.

In performing his activities a commercial agent<sup>7</sup> must look after the interests of his principal, and act dutifully and in good faith<sup>8</sup>. Similarly, in his relations with his commercial agent a principal must act dutifully and in good faith<sup>9</sup>. No derogation from these requirements is permissible<sup>10</sup>.

1 See eg *Parker v McKenna* (1874) 10 Ch App 96.

2 See eg *Burdick v Garrick* (1870) 5 Ch App 233; *Brown v IRC* [1965] AC 244, [1964] 3 All ER 119, HL; cf *Henry v Hammond* [1913] 2 KB 515, where a shipping agent holding the proceeds of sale of a wreck was held not to be bound to keep such proceeds as a separate fund on behalf of his principal and was a mere debtor as to the sum, and not a trustee.

3 A sub-agent may also owe such duties even where there is no privity of contract between him and the principal if the sub-agent knows that the agent is acting for a principal and the principal assents to the employment of the sub-agent: *Powell and Thomas v Evan Jones & Co* [1905] 1 KB 11, CA, where, however, it was considered that the relation of principal and agent in fact existed between the principal and the sub-agent. In connection with privity of contract between sub-agents and principals see also PARA 54.

4 See PARA 82.

5 See PARA 89.

6 See PARAS 91-94. An agent has a duty to give a principal continued access to records relating to acts done in the principal's name unless that duty is expressly excluded by any contract made between the parties: see *Yasuda Fire and Marine Insurance Co of Europe Ltd v Orion Marine Insurance Underwriting Agency Ltd* [1995] QB 174, [1995] 3 All ER 211; and PARA 82.

7 As to the meaning of 'commercial agent' see PARA 72.

8 Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 3(1). As to the cases to which those Regulations apply see PARA 72.

9 Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 4(1).

10 Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 5(1). The consequence of breach is governed by the law applicable to the contract: reg 5(2).

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/5. RELATIONS BETWEEN PRINCIPAL AND AGENT/(2) DUTIES OF AGENTS TO PRINCIPALS/(i) General Duties/74. Agent to perform business undertaken.

## (2) DUTIES OF AGENTS TO PRINCIPALS

### (i) General Duties

#### 74. Agent to perform business undertaken.

The primary duty of an agent is to carry out, generally in person<sup>1</sup>, the business he has undertaken<sup>2</sup>, or to inform his principal promptly if it is impossible to do so<sup>3</sup>.

If the agent is given definite instructions from his principal as to the manner in which the business is to be carried out, he must follow them strictly<sup>4</sup>, provided that they are lawful<sup>5</sup>; and, if he does so, he will not be liable to his principal merely because the consequences differ from those which the principal had expected<sup>6</sup>. He has, however, no discretion to disregard them, even though he acts in good faith in the interests of his principal<sup>7</sup>.

A commercial agent<sup>8</sup> must:

- 25 (1) make proper efforts to negotiate and where appropriate conclude the transactions of which he is instructed to take care<sup>9</sup>;
- 26 (2) communicate to his principal<sup>10</sup> all the necessary information available to him<sup>11</sup>; and
- 27 (3) comply with reasonable instructions given by his principal<sup>12</sup>.

No derogation from the requirements so imposed on a commercial agent is permissible<sup>13</sup>.

1 *Catlin v Bell* (1815) 4 Camp 183; *Cook v Ward* (1877) 2 CPD 255, CA; *Henderson v Barnewall* (1827) 1 Y & J 387. As to delegation by the agent see further PARAS 48-56.

2 *Turpin v Bilton* (1843) 5 Man & G 455. Thus the duty of an agent employed to sell land does not terminate on submitting an offer which is accepted 'subject to contract'. As the matter is still open to negotiation he is bound to continue submitting any higher offer received until a binding contract has been signed: *Keppel v Wheeler* [1927] 1 KB 577, CA. The contract between a vendor and an agent does not usually, however, require the agent to disclose confidential information to the vendor about other vendors of comparable properties on whose behalf he may be acting or preclude the agent from seeking to earn a commission on the sale of the property of a rival vendor: *Kelly v Cooper* [1993] AC 205, PC. If, however, the business is unlawful (*Webster v De Tastet* (1797) 7 Term Rep 157) or the agency is gratuitous (*Balfe v West* (1853) 13 CB 466), the agent incurs no liability through his failure to carry out the business. See also *Lothian v Jenolite Ltd* 1969 SC 111, Ct of Sess (no duty on agent to devote himself exclusively to business of principal and not to act on behalf of competitors of principal, in absence of express or implied term in the contract to that effect).

3 *Cassaboglou v Gibb* (1883) 11 QBD 797, CA; *Callander v Oelrichs* (1838) 5 Bing NC 58. An estate agent into whose hands property is placed for sale on commission terms is not, in the absence of specific provisions, under any obligation to do anything (see *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108, [1941] 1 All ER 33, HL), unless he is appointed a sole agent, in which case there may be implied a condition that he will use his best endeavours (*Mendoza & Co v Bell* (1952) 159 Estates Gazette 372). As to the nature of the contract with an estate agent and his right to commission generally see PARA 103; as to the statutory regulation of estate agents see PARAS 239-281.

4 *Lilley v Doubleday* (1881) 7 QBD 510; *Smith v Lascelles* (1788) 2 Term Rep 187; *Catlin v Bell* (1815) 4 Camp 183; *Barber v Taylor* (1839) 5 M & W 527; *Dufresne v Hutchinson* (1810) 3 Taunt 117.

5 *Bexwell v Christie* (1776) 1 Cowp 395. Thus failure to comply with instructions as to effecting a ppi ('policy proof of interest') insurance policy is not a breach of duty for which damages will be awarded: *Thomas Cheshire & Co v Vaughan Bros & Co* [1920] 3 KB 240, CA.

6 *Overend and Gurney Co v Gibb and Gibb* (1872) LR 5 HL 480; and see *Commonwealth Portland Cement Co Ltd v Weber Lohmann & Co Ltd* [1905] AC 66, PC.

7 *Bertram, Armstrong & Co v Godfray* (1830) 1 Knapp 381, PC; *Fray v Voules* (1859) 1 E & E 839, where a solicitor compromised an action on the advice of counsel against the express instructions of his client; and contrast *Chown v Parrott* (1863) 14 CBNS 74 (where the client had given no express instructions).

8 As to the meaning of 'commercial agent' see PARA 72.

9 Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 3(2)(a). As to the cases to which those Regulations apply see PARA 72.

10 As to the meaning of 'principal' see PARA 72. For the principal's corresponding responsibilities see reg 4(2); and PARA 81.

11 Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 3(2)(b).

12 Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 3(2)(c).

13 Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 5(1). The consequence of breach is governed by the law applicable to the contract: reg 5(2).

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/5. RELATIONS BETWEEN PRINCIPAL AND AGENT/(2) DUTIES OF AGENTS TO PRINCIPALS/(i) General Duties/75. Exercise of discretion.

## 75. Exercise of discretion.

Where no definite instructions have been given to the agent, or where his instructions leave him a discretion, the agent must be guided by the honest exercise of his own judgment and the interests of his principal<sup>1</sup>. If his instructions leave two alternative courses open to him, he incurs no liability merely because he chooses that course which proves in the event less favourable to his principal<sup>2</sup>. Where he is a professional agent, he must follow the ordinary course of such a business<sup>3</sup>, which includes the ordinary course of any previous business as between the principal and the agent<sup>4</sup>, and any special usages applicable to the particular case<sup>5</sup>.

1 *Chown v Parrott* (1863) 14 CBNS 74; see also *Lagunas Nitrate Co v Lagunas Syndicate* [1899] 2 Ch 392, CA.

2 *Comber v Anderson* (1808) 1 Camp 523; *Moore v Mourgue* (1776) 2 Cowp 479; *Ireland v Livingston* (1872) LR 5 HL 395; *S Weigall & Co v Runciman & Co* (1916) 85 LJB 1187, CA; *Gould v South Eastern and Chatham Rly Co* [1920] 2 KB 186, DC; see also PARA 35, and the suggestion made there as to the possible effect of the development of modern communications on this rule.

3 *Russell v Hankey* (1794) 6 Term Rep 12; *Mallough v Barber* (1815) 4 Camp 150; *Papé v Westacott* [1894] 1 QB 272, CA.

4 See *World Transport Agency Ltd v Royte (England) Ltd* [1957] 1 Lloyd's Rep 381, where the ordinary course of business between the parties was for the shipping agents not to enter goods for customs without specific instructions, and the agents had been given express prohibition to this effect; the agents were held not to be negligent in not making an entry of goods where such entry would have saved the principal paying increased duties.

5 *Farrer v Lacy, Hartland & Co* (1885) 31 ChD 42, CA; *Solomon v Barker* (1862) 2 F & F 726.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/5. RELATIONS BETWEEN PRINCIPAL AND AGENT/(2) DUTIES OF AGENTS TO PRINCIPALS/(i) General Duties/76. Use of information, etc acquired in agency.

## 76. Use of information, etc acquired in agency.

It is the duty of an agent to employ the materials and information obtained by reason of his agency solely for the purposes of the agency<sup>1</sup>, and not to use any materials or information so acquired, whether his agency has come to an end or not, in any manner inconsistent with good faith, as by divulging them to third parties<sup>2</sup>, or by using them himself in unfair competition with his principal<sup>3</sup>. In the case of alleged misuse of information by competition with the principal, the agent will be liable to account for profits made unless the business in which use is made of the information is outside the scope of the business of the principal and does not compete with it<sup>4</sup>. When called upon to account for profits acquired by reason of his fiduciary position and of information obtained in that position, the agent can only defeat the claim by showing that he made the profits with the knowledge and assent of the principal<sup>5</sup>. It is no defence that the

principal would not in fact have the capacity or the desire to carry out the transactions out of which the profits arose, or that the agent acted in good faith<sup>6</sup>.

An agent will not be made to account to a principal or former principal for profits made by the use of such information or knowledge acquired in the course of the agency as is not secret or confidential<sup>7</sup>. Where an agent in breach of duty to his principal acts for a second principal and in the course of so acting acquires information which is confidential to the second principal he must not disclose that information to the first principal<sup>8</sup>. The agent may, however, be liable to compensate the first principal for any loss caused by the resultant conflict of duties<sup>9</sup>.

1 *Lamb v Evans* [1893] 1 Ch 218, CA, per Bowen LJ; *Merryweather v Moore* [1892] 2 Ch 518; *Louis v Smellie* (1895) 73 LT 226, CA.

2 *Merryweather v Moore* [1892] 2 Ch 518; *Lamb v Evans* [1893] 1 Ch 218, CA, where Bowen LJ disapproved *Reuter's Telegram Co v Byron* (1874) 43 LJ Ch 661; *Taylor v Blacklow* (1836) 3 Scott 614; *Davies v Clough* (1837) 8 Sim 262; *Kirchner & Co v Gruban* [1909] 1 Ch 413; *LS Harris Trustees Ltd (t/a LS Harris & Co) v Power Packing Services (Hermit Road) Ltd* [1970] 2 Lloyd's Rep 65; *Fogg v Gaultier and Blanc* (1960) 110 L Jo 718. Third parties here include a second principal of the agent: see *North and South Trust Co v Berkeley, Berkeley v North and South Trust Co* [1971] 1 All ER 980, [1971] 1 WLR 470. There is no requirement for an agent to be able to bind a principal regarding third parties before a fiduciary duty will arise: see *Società Esplosivi Industriali SpA v Ordnance Technologies (UK) Ltd (formerly SEI (UK) Ltd)* [2004] EWHC 48 (Ch), [2004] 1 All ER (Comm) 619.

3 *Robb v Green* [1895] 2 QB 315, CA; *Yovatt v Winyard* (1820) 1 Jac & W 394; *Amber Size and Chemical Co Ltd v Menzel* [1913] 2 Ch 239; *Measures Bros Ltd v Measures* [1910] 1 Ch 336. As to the position in the case of employees see *Louis v Smellie* (1895) 73 LT 226, CA; *Faccenda Chicken Ltd v Fowler* [1987] Ch 117, [1986] 1 All ER 617, CA; as a general rule a former employee must be free to use the skills and knowledge acquired while working for the ex-employer subject to the law protecting the employer's trade secrets: see **EMPLOYMENT** vol 39 (2009) PARA 59.

4 *Aas v Benham* [1891] 2 Ch 244, CA.

5 *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134n, [1942] 1 All ER 378, HL; *Phipps v Boardman* [1964] 2 All ER 187, [1964] 1 WLR 993 (affd [1965] Ch 992, [1965] 1 All ER 849, CA; sub nom *Boardman v Phipps* [1967] 2 AC 46, [1966] 3 All ER 721, HL); *English v Dedham Vale Properties Ltd* [1978] 1 All ER 382, [1978] 1 WLR 93.

6 *Boardman v Phipps* [1967] 2 AC 46, [1966] 3 All ER 721, HL.

7 *Nordisk Insulinlaboratorium v Gorgate Products Ltd (sued as CL Bencard (1934) Ltd)* [1953] Ch 430, [1953] 1 All ER 986, CA.

8 See *North and South Trust Co v Berkeley, Berkeley v North and South Trust Co* [1971] 1 All ER 980, [1971] 1 WLR 470.

9 See *North and South Trust Co v Berkeley, Berkeley v North and South Trust Co* [1971] 1 All ER 980, [1971] 1 WLR 470.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/5. RELATIONS BETWEEN PRINCIPAL AND AGENT/(2) DUTIES OF AGENTS TO PRINCIPALS/(i) General Duties/77. Contracts.

## 77. Contracts.

In the absence of authority to do so, an agent must not purport to bind his principal by contract<sup>1</sup>. Where he possesses authority so to do, he must contract in his principal's name and not in his own, unless the terms of his employment permit it<sup>2</sup>. If he purchases property in his own name on behalf of his principal, and has the legal estate transferred to himself, he is a trustee for his principal in respect of the property<sup>3</sup>.



No agent, however, is under any personal liability to his principal upon any contracts made by him on the latter's behalf<sup>4</sup>, unless he is made personally liable by usage, or unless he is acting as a del credere agent<sup>5</sup>, or unless he otherwise contracts to be so liable.

1 Cf *Chadburn v Moore* (1892) 61 LJ Ch 674 with *Rosenbaum v Belson* [1900] 2 Ch 267; and see *Hamer v Sharp* (1874) LR 19 Eq 108; *Lewcock v Bromley* (1920) 127 LT 116. The principal may, however, be liable on such contracts to the third party: see PARAS 123, 145.

2 A factor has implied authority to contract in his own name; a broker, in the absence of usage, has not: *Baring v Corrie* (1818) 2 B & Ald 137; *Cropper v Cook* (1868) LR 3 CP 194. See also as to factors PARA 43.

3 *Lees v Nuttall* (1834) 2 My & K 819; and see PARA 96; cf *James v Smith* [1891] 1 Ch 384, CA.

4 *Alsop v Silvester* (1823) 1 C & P 107; *Risbourg v Bruckner* (1858) 3 CBNS 812; *Castrique v Buttigieg* (1855) 10 Moo PCC 94. As to the agent's liability to his principal as holder of a bill of exchange signed by the agent without qualification see **FINANCIAL SERVICES AND INSTITUTIONS**.

5 See PARA 13.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/5. RELATIONS BETWEEN PRINCIPAL AND AGENT/(2) DUTIES OF AGENTS TO PRINCIPALS/(ii) Care, Skill and Diligence/78. Ordinary duty to use care and skill.

## (ii) Care, Skill and Diligence

### 78. Ordinary duty to use care and skill.

Every agent<sup>1</sup>, including a gratuitous agent<sup>2</sup>, is responsible to his principal for any loss occasioned by his want of proper care, skill or diligence, in the carrying out of his undertaking<sup>3</sup>, even though the principal has himself been negligent in not discovering the agent's breach of duty<sup>4</sup>. No absolute standard can be laid down as to what constitutes proper care, skill or diligence, and each particular case must be judged by its own circumstances<sup>5</sup>. In the case of a gratuitous agent this duty is founded on the law of tort<sup>6</sup>. In the case of a contractual agent: (1) the duty arises only from contract where the duty would not have arisen apart from contract<sup>7</sup>; and (2) the duty may be based on both contract and tort in cases where, apart from the contract, the law would regard the mere status of the parties as giving rise to a duty of care<sup>8</sup>.

1 This does not generally include advocates: see *Fell v Brown* (1791) 1 Peake 131; *Mulligan v McDonagh* (1860) 2 LT 136; *Perring v Rebutter* (1842) 2 Mood & R 429; *Rondel v Worsley* [1969] 1 AC 191, [1967] 3 All ER 993, HL; *Kelley v Corston* [1998] QB 686, [1997] 4 All ER 466, CA; *Richardson v Morton* [2002] EWCA Civ 124. As to a barrister's duty of care see **LEGAL PROFESSIONS** vol 66 (2009) PARA 1145.

2 *Chaudhry v Prabhakar* [1988] 3 All ER 718, [1989] 1 WLR 29, CA. As to gratuitous agents see PARA 79.

3 *Beal v South Devon Rly Co* (1864) 3 H & C 337, Ex Ch.

4 *Becker v Medd* (1897) 13 TLR 313, CA.

5 The question is one of fact: *Beauchamp v Powley* (1831) 1 Mood & R 38; *Doorman v Jenkins* (1834) 2 Ad & El 256; *Faruk v Wyse* [1988] 2 EGLR 26 (failure of estate agent to make proper inquiries as to status of tenant).

6 See eg *Gomer v Pitt and Scott* (1922) 12 Ll L Rep 115; *Chaudhry v Prabhakar* [1988] 3 All ER 718, [1989] 1 WLR 29, CA. As to the extent of this duty see PARA 79. See also *Glasgow West Housing Association Ltd v Siddique* 1998 SLT 1081, Ct of Sess (agreement conferred absolute discretion on agent; term not implied obliging agent to carry out work to a particular standard).

7 See eg *Jarvis v Moy, Davies, Smith, Vandervell & Co* [1936] 1 KB 399, CA (stockbroker); *Groom v Crocker* [1939] 1 KB 194, [1938] 2 All ER 394, CA (solicitor); *Bagot v Stevens Scanlan & Co Ltd* [1966] 1 QB 197, [1964] 3 All ER 577 (architect).

8 Persons owing such duty include common carriers, common innkeepers, bailees and employers: see *Bagot v Stevens Scanlan & Co Ltd* [1966] 1 QB 197, [1964] 3 All ER 577.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/5. RELATIONS BETWEEN PRINCIPAL AND AGENT/(2) DUTIES OF AGENTS TO PRINCIPALS/(ii) Care, Skill and Diligence/79. Gratuitous agents.

## 79. Gratuitous agents.

Where an agent acts without reward he is only bound to use such skill as he has<sup>1</sup>, except where he has represented himself as possessing skill, in which case the amount of skill requisite is such as may reasonably be expected under the circumstances<sup>2</sup>. The care and diligence required are such as persons ordinarily use in their own affairs<sup>3</sup>.

1 *Beal v South Devon Rly Co* (1864) 3 H & C 337, Ex Ch; *Wilson v Brett* (1843) 11 M & W 113; *Moffatt v Bateman* (1869) LR 3 PC 115.

2 *Chaudhry v Prabhakar* [1988] 3 All ER 718, [1989] 1 WLR 29, CA. Such representation may be express (*Whitehead v Greetham* (1825) 2 Bing 464) or implied (*Donaldson v Haldane* (1840) 7 Cl & Fin 762).

3 *Beal v South Devon Rly Co* (1864) 3 H & C 337, Ex Ch; *Shiells and Thorne v Blackburne* (1789) 1 Hy Bl 159; *Doorman v Jenkins* (1834) 2 Ad & El 256; *Giblin v McMullen* (1868) LR 2 PC 317; *Bullen v Swan Electric Engraving Co* (1907) 23 TLR 258, CA. See also PARA 78 text and notes 3, 6.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/5. RELATIONS BETWEEN PRINCIPAL AND AGENT/(2) DUTIES OF AGENTS TO PRINCIPALS/(ii) Care, Skill and Diligence/80. Agent for reward.

## 80. Agent for reward.

Where an agent acts for reward, a higher standard is exacted than in the case of an agent acting without reward<sup>1</sup>. The care, skill or diligence required is not merely that which the agent in fact possesses, but such as is reasonably necessary for the due performance of his undertaking<sup>2</sup>. He must show at least such diligence in conducting his principal's business as the principal would reasonably have been able to display if the principal had undertaken the business himself<sup>3</sup>. If he is an agent following a particular trade or profession, and holding himself out to the world for employment as such, he represents himself as reasonably competent to carry out any business which he undertakes in the course of such trade or profession<sup>4</sup>. He must then show such care and diligence as are exercised in the ordinary and proper course, and such skill as is usual and requisite, in the business for which he receives payment<sup>5</sup>. In considering the question regard must be had to the nature of the business<sup>6</sup>, and such special usages as may be binding on the principal<sup>7</sup>.

The agent is not responsible for failure to go beyond his reasonable duty, even though a loss is occasioned thereby, which might have been avoided by extra care, skill or diligence<sup>8</sup>. Nor does he incur liability in respect of matters which are not within the scope of his employment<sup>9</sup>, nor in respect of failure to enter on behalf of his principal into contracts which, if made, would be void<sup>10</sup>. If the agent, according to the instructions of his principal, makes a contract which is void

for illegality, the agent is not liable if the contract is also unenforceable owing to negligence on the part of the agent<sup>11</sup>.

- 1 *Grill v General Iron Screw Collier Co* (1866) LR 1 CP 600. As to a member's agent's duty of care to a Lloyd's name in relation to high-risk syndicates, see *Brown v KMR Services Ltd* [1995] 4 All ER 598, CA.
- 2 *Beal v South Devon Rly Co* (1864) 3 H & C 337, Ex Ch. See also *Brown v KMR Services Ltd* [1995] 4 All ER 598, CA.
- 3 *B Davis Ltd v Tooth & Co Ltd* [1937] 4 All ER 118, PC.
- 4 *Harmer v Cornelius* (1858) 5 CBNS 236; *Jenkins v Betham* (1855) 15 CB 168. See also *Tenenbaum v Garrod* [1988] 2 EGLR 178, CA (estate agent's valuations).
- 5 *Beal v South Devon Rly Co* (1864) 3 H & C 337, Ex Ch, per Crompton J; *Smith v Barton* (1866) 15 LT 294; *Lee v Walker* (1872) LR 7 CP 121; *Solomon v Barker* (1862) 2 F & F 726; *Weld-Blundell v Stephens* [1920] AC 956, HL; *Jones v European and General Express Co Ltd* (1920) 25 Com Cas 296; *Keppel v Wheeler* [1927] 1 KB 577, CA.
- 6 *Heys v Tindall* (1861) 1 B & S 296.
- 7 *Russell v Hankey* (1794) 6 Term Rep 12; *Mallough v Barber* (1815) 4 Camp 150; *Papé v Westacott* [1894] 1 QB 272, CA; *Farrer v Lacy, Hartland & Co* (1885) 31 ChD 42, CA; *Wilts and Dorset Bank v Cook* (1889) 5 TLR 703; *Pelham v Hilder* (1841) 1 Y & C Ch Cas 3. See further PARA 44.
- 8 *Commonwealth Portland Cement Co Ltd v Weber, Lohmann & Co Ltd* [1905] AC 66, PC; *World Transport Agency Ltd v Royle (England) Ltd* [1957] 1 Lloyd's Rep 381.
- 9 *Zwilchenbart v Alexander* (1860) 1 B & S 234; *Jenkins v Betham* (1855) 15 CB 168; and see *Lee v Walker* (1872) LR 7 CP 121; *Lamert v Heath* (1846) 15 M & W 486; *Pappa v Rose* (1871) LR 7 CP 32; affd (1872) LR 7 CP 525, Ex Ch.
- 10 *Cohen v Kittell* (1889) 22 QBD 680, DC.
- 11 *Thomas Cheshire & Co v Vaughan Bros & Co* [1920] 3 KB 240, CA (ppi (policy proof of interest) policy repudiated by insurers for non-disclosure).

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/5. RELATIONS BETWEEN PRINCIPAL AND AGENT/(2) DUTIES OF AGENTS TO PRINCIPALS/(ii) Care, Skill and Diligence/81. Negotiation of contract.

## 81. Negotiation of contract.

Both where the Commercial Agents (Council Directive) Regulations 1993 apply<sup>1</sup>, and at common law, the agent must make proper efforts to negotiate and conclude transactions<sup>2</sup>. In the negotiation of a contract the agent must take all reasonable precautions that may be requisite for the protection of his principal<sup>3</sup>. Any contract made by him must be in accordance with his instructions<sup>4</sup> or with usage<sup>5</sup>. Its form must be such that it is capable of being enforced by the principal<sup>6</sup>. If the contract is once completed, the agent cannot rescind it<sup>7</sup> or vary its terms<sup>8</sup>, unless he is expressly authorised to do so.

The agent must not be guilty of unreasonable delay in carrying out his instructions<sup>9</sup>, or in communicating to his principal any material information<sup>10</sup>.

In the case of a commercial agent a principal must inform his commercial agent within a reasonable period of his acceptance or refusal of, and of any non-execution by him of, a commercial transaction which the commercial agent has procured for him<sup>11</sup>.

1 le the Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053. As to where those Regulations apply see PARA 72.

2 See the Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 3(2)(a); PARA 74; and the text and notes 3-10. In the case of a commercial agent a principal is obliged to provide his agent with the necessary documentation for the goods concerned, and information necessary for the performance of the agency contract, and must give his agent reasonable notice if he anticipates that the volume of commercial transactions will be significantly lower than that which the commercial agent could normally have expected: reg 4(2). As to the meaning of 'commercial agent' see PARA 72.

3 *Heys v Tindall* (1861) 1 B & S 296; *Smith v Barton* (1866) 15 LT 294; *Solomon v Barker* (1862) 2 F & F 726.

4 *Park v Hammond* (1816) 6 Taunt 495; and see *Dickson & Co v Devitt* (1916) 86 LJB 315.

5 *Mallough v Barber* (1815) 4 Camp 150. As to usage see PARA 44.

6 *McManus v Fortescue* [1907] 2 KB 1, CA; *Rainbow v Hawkins* [1904] 2 KB 322; *Scott and Horton v Godfrey* [1901] 2 KB 726; *May and Hart v Angeli* (1898) 14 TLR 551, HL; *Neilson v James* (1882) 9 QBD 546, CA. A broker must make the contract binding on both parties: *Grant v Fletcher* (1826) 5 B & C 436.

7 *Xenos v Wickham* (1866) LR 2 HL 296; *Thomas v Lewis* (1878) 4 ExD 18; *Nelson v Aldridge* (1818) 2 Stark 435.

8 *Hibbert v Bayley* (1860) 2 F & F 48.

9 *Turpin v Bilton* (1843) 5 Man & G 455.

10 *Proudfoot v Montefiore* (1867) LR 2 QB 511. As to the duty of disclosure see further PARAS 89-90.

11 Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, regs 4(3), 5.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/5. RELATIONS BETWEEN PRINCIPAL AND AGENT/(2) DUTIES OF AGENTS TO PRINCIPALS/(iii) Accounts: Money Received on Behalf of Principal/82. Duty to keep accounts.

### **(iii) Accounts: Money Received on Behalf of Principal**

#### **82. Duty to keep accounts.**

It is the duty of an agent to keep accurate accounts of all his transactions<sup>1</sup> and to be prepared at all times to produce them to his principal<sup>2</sup>. If he fails to keep proper accounts every presumption consistent with the facts will weigh in favour of the principal<sup>3</sup>. Thus, if he improperly mixes the principal's property with his own, all that he cannot show to be his own will be presumed to belong to the principal<sup>4</sup>. Further, all books and documents relating to the principal's business must on demand be produced to the principal, or to some person named by him<sup>5</sup>, provided that such person is not one against whom the agent may have reasonable grounds of objection<sup>6</sup>. The principal's right to be informed of the state of his contractual relationships (1) with third parties, and (2) with the agent, is inherent in the agency mandate, and accordingly the right can exist both in the case of a gratuitous agency, and in the case of a contractual agency that has been terminated<sup>7</sup>.

1 *Gray v Haig* (1855) 20 Beav 219; *Lord Chedworth v Edwards* (1802) 8 Ves 46; *White v Lady Lincoln* (1803) 8 Ves 363; *Yasuda Fire and Marine Insurance of Europe Ltd v Orion Marine Insurance Underwriting Agency Ltd* [1995] QB 174, [1995] 3 All ER 211. The rule does not, however, apply where the agency is only to receive moneys in respect of separate transactions known to the principal in detail at the time: *Re Lee, ex p Neville* (1868) 4 Ch App 43, CA.

2 *Pearse v Green* (1819) 1 Jac & W 135. Investigation of an agent's accounts is not an imputation of dishonesty: *Drysdale v Earl of Rosebery* 1909 SC 1121.

3 *Gray v Haig* (1855) 20 Beav 219; *Clarke v Tipping* (1846) 9 Beav 284.

4 *Lupton v White* (1808) 15 Ves 432. As to keeping the principal's property separate see also PARA 84.

5 *Bevan v Webb* [1901] 2 Ch 59, CA. As to the position where an agent owes a duty to more than one principal see PARA 76.

6 *Dadswell v Jacobs* (1887) 34 ChD 278, CA.

7 *Yasuda Fire and Marine Insurance of Europe Ltd v Orion Marine Insurance Underwriting Agency Ltd* [1995] QB 174, [1995] 3 All ER 211.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/5. RELATIONS BETWEEN PRINCIPAL AND AGENT/(2) DUTIES OF AGENTS TO PRINCIPALS/(iii) Accounts: Money Received on Behalf of Principal/83. Sale of horticultural produce on commission.

### **83. Sale of horticultural produce on commission.**

An agent employed to sell on commission horticultural produce (vegetables, fruit, flowers and plants) is under a statutory duty to keep a special form of accounts and to render specified particulars of sales to his principal as soon after the sales as is practicable<sup>1</sup>.

1 See the Horticultural Produce (Sales on Commission) Act 1926; and **AGRICULTURAL PRODUCTION AND MARKETING** vol 1 (2008) PARAS 1144-1146.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/5. RELATIONS BETWEEN PRINCIPAL AND AGENT/(2) DUTIES OF AGENTS TO PRINCIPALS/(iii) Accounts: Money Received on Behalf of Principal/84. Keeping principal's property separate.

### **84. Keeping principal's property separate.**

Where money is entrusted to an agent by his principal or received by him on his principal's behalf, it depends upon the terms of the agency whether the agent is bound to keep the money separate or is entitled to mix it with his own. In the former case the agent will be a trustee, in the latter a debtor<sup>1</sup>.

1 *Burdick v Garrick* (1870) 5 Ch App 233, CA; *Lyell v Kennedy* (1889) 14 App Cas 437, HL; *Henry v Hammond* [1913] 2 KB 515.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/5. RELATIONS BETWEEN PRINCIPAL AND AGENT/(2) DUTIES OF AGENTS TO PRINCIPALS/(iii) Accounts: Money Received on Behalf of Principal/85. Payments made to agent for principal.

### **85. Payments made to agent for principal.**

When an agent is employed to carry out any transaction which involves a payment to him on his principal's behalf<sup>1</sup>, he must not compromise his principal's rights<sup>2</sup> or part with his property<sup>3</sup>, until he has received payment, unless authorised by his instructions or by usage to do so<sup>4</sup>; but,

in the absence of negligence on the part of the agent, he is not liable merely because the debtor, being insolvent, does not pay the debt in full: in such circumstances his duty is to collect all he can<sup>5</sup>. In the absence of instructions or usage, payment must be received in cash, and not otherwise<sup>6</sup>.

All moneys received on the principal's behalf<sup>7</sup> must be paid over<sup>8</sup> or accounted for<sup>9</sup> to the principal upon request<sup>10</sup>, unless the agent has for some lawful reason repaid them to the person from whom he received them<sup>11</sup>. It is immaterial that the transaction in respect of which the moneys are received is void<sup>12</sup> or illegal<sup>13</sup>, provided that the agency itself is not illegal<sup>14</sup>. Nor can the agent retain such moneys against the principal in respect of a debt due to himself from the person paying them, or because of some claim made to them by some third person<sup>15</sup>. Failure to pay renders the agent liable to a claim for money had and received<sup>16</sup>.

Where the moneys are received on behalf of joint principals, the agent is liable to account to them jointly, and is not discharged by payment to one or more of them only, unless by authority of all<sup>17</sup>.

1 As to the agent's authority to receive payment and whether payment to the agent discharges the debt see PARAS 38, 133.

2 As in *Papé v Westacott* [1894] 1 QB 272, CA.

3 As in *Brown v Boorman, Boorman and Wild* (1844) 11 Cl & Fin 1, HL; *Kidd v Horne* (1885) 2 TLR 141.

4 *Wiltshire v Sims* (1808) 1 Camp 258; *Earl Ferrers v Robins* (1835) 2 Cr M & R 152. A factor (*Houghton v Matthews* (1803) 3 Bos & P 485) and a broker (*Brown v Boorman, Boorman and Wild* (1844) 11 Cl & Fin 1, HL) have an implied authority to sell on credit. As to usage see further PARA 44.

5 *Gokal Chand-Jagan Nath v Nand Ram Das-Atma Ram* [1939] AC 106, [1938] 4 All ER 407, PC, following *Russell v Palmer* (1767) 2 Wils 325.

6 Thus it may not normally be received by a negotiable instrument (*Papé v Westacott* [1894] 1 QB 272, CA; *Wiltshire v Sims* (1808) 1 Camp 258; *Earl Ferrers v Robins* (1835) 2 Cr M & R 152; *Hine Bros v Steamship Insurance Syndicate Ltd, The Netherholme, Glen Holme, and Rydal Holme* (1895) 72 LT 79, CA), unless authorised by usage (*Farrer v Lacy Hartland & Co* (1885) 31 ChD 42, CA); or by set-off or settlement of accounts (*Sweeting v Pearce* (1859) 7 CBNS 449 (affd (1861) 9 CBNS 534, Ex Ch); *Legge v Byas, Mosley & Co* (1901) 7 Com Cas 16), any usage to that effect being unreasonable (*Matveieff & Co v Crossfield* (1903) 51 WR 365; *Sweeting v Pearce*; *Legge v Byas, Mosley & Co*); or by taking other goods (*Howard v Chapman* (1831) 4 C & P 508). See also *Catterall v Hindle* (1866) LR 1 CP 187; on appeal (1867) LR 2 CP 368, Ex Ch; *International Sponge Importers Ltd v Andrew Watt & Sons* [1911] AC 279, HL; *Bradford & Sons v Price Bros* (1923) 92 LJB 871; and PARA 38.

7 As to what may amount to a receipt see *Gillard v Wise* (1826) 5 B & C 134.

8 *Wilkinson v North Suburban Properties Ltd* (1959) 174 Estates Gazette 213, CA (whole of deposit paid to sub-agent 'subject to contract' payable by sub-agent to estate agent).

9 As to the claim for account see PARA 87.

10 *Harsant v Blaine, Macdonald & Co* (1887) 56 LJB 511, CA.

11 *Murray v Mann* (1848) 2 Exch 538.

12 *Bridger v Savage* (1885) 15 QBD 363, CA; *De Mattos v Benjamin* (1894) 63 LJB 248, DC.

13 *Bousfield v Wilson* (1846) 16 M & W 185; *Tenant v Elliott* (1797) 1 Bos & P 3; *Farmer v Russell* (1798) 1 Bos & P 296; *Sharp v Taylor* (1849) 2 Ph 801; and see *Sykes v Beadon* (1879) 11 ChD 170.

14 See *Booth v Hodgson* (1795) 6 Term Rep 405; *Catlin v Bell* (1815) 4 Camp 183; *Knowles v Haughton* (1805) 11 Ves 168; *Battersby v Smyth* (1818) 3 Madd 110, with which cf *Davenport v Whitmore* (1836) 2 My & Cr 177.

15 *Roberts v Ogilby* (1821) 9 Price 269; *Dixon v Hammond* (1819) 2 B & Ald 310. As to the cases in which he may interplead see PARA 120.

16 See *Blaustein v Maltz Mitchell & Co* [1937] 2 KB 142, [1937] 1 All ER 497, CA.

17 *Lee v Sankey* (1873) LR 15 Eq 204; *Heath v Chilton* (1844) 12 M & W 632.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/5. RELATIONS BETWEEN PRINCIPAL AND AGENT/(2) DUTIES OF AGENTS TO PRINCIPALS/(iv) Remedies for Default of Agent/86. Claim for damages.

## **(iv) Remedies for Default of Agent**

### **86. Claim for damages.**

Upon an agent's breach of duty the principal's remedy is, as a rule, to claim damages for breach of contract<sup>1</sup>, and the period of limitation<sup>2</sup> runs in the agent's favour from the date of the breach<sup>3</sup>.

Where an agent is sued by his principal for breach of contract, the measure of damages is the measure recoverable under the general law of contract, which is the full amount of the loss actually sustained<sup>4</sup>, and no more<sup>5</sup>, provided that such loss is the natural and probable consequence<sup>6</sup> of the breach of duty, or such as was within the contemplation of the parties<sup>7</sup>. This may include profit which has actually been lost, but not merely expected profits which might have been made if the agent had performed his duty<sup>8</sup>. Where the agency is gratuitous, the claim by the principal for damages will be in tort<sup>9</sup>.

Where, owing to the negligence of the agent, the principal has been convicted of a criminal offence, whether or not the principal can recover by way of damages for that negligence any penalty imposed on him upon his conviction is the subject of conflicting authorities, but, where the liability for the offence is absolute, and the principal has not himself been guilty of any fault, negligence or dishonesty, but he has been grossly misled by his agent, he has been held entitled to recover the amount of the penalty from the agent<sup>10</sup>.

1 Where the agent has accepted a bribe, the principal may alternatively claim the amount of the bribe as money had and received: *Mahesan v Malaysia Government Officers' Co-operative Housing Society Ltd* [1979] AC 374, [1978] 2 All ER 405, PC.

2 See the Limitation Act 1980 s 5; and **LIMITATION PERIODS** vol 68 (2008) PARA 952.

3 *Wood v Jones* (1889) 61 LT 551; *Metropolitan Bank v Heiron* (1880) 5 ExD 319, CA (fraud). This is so even where the agent acted in a fiduciary capacity, unless he has been guilty of fraud, or unless the claim is for property entrusted to him, or for the proceeds or value of such property: see the Limitation Act 1980 ss 21, 32; *North American Land and Timber Co Ltd v Watkins* [1904] 1 Ch 242; affd [1904] 2 Ch 233, CA; *Re Lands Allotment Co* [1894] 1 Ch 616, CA; and **LIMITATION PERIODS** vol 68 (2008) PARAS 1140 et seq, 1220 et seq. As to whether a claim lies in tort or in contract see PARA 78.

4 *Smith v Price* (1862) 2 F & F 748; *Maydew v Forrester* (1814) 5 Taunt 615; *Neilson v James* (1882) 9 QBD 546, CA. If there has been no actual loss, the principal is entitled to nominal damages (*Van Wart v Woolley* (1830) Mood & M 520). As to the measure of damages where an agent to sell land signs a contract in excess of authority and the principal is sued for specific performance see *Lewcock v Bromley* (1920) 127 LT 116; and as to the measure where an agent to sell land fails to disclose a higher offer see *Keppel v Wheeler* [1927] 1 KB 577, CA. As to the right of the principal to an indemnity where an agent has abused powers of which he is a trustee see *Eastern Shipping Co Ltd v Quah Beng Kee* [1924] AC 177, PC.

5 *Waddell v Blockey* (1879) 4 QBD 678, CA; *Cassaboglou v Gibb* (1883) 11 QBD 797, CA; and see *Michael v Hart & Co* [1902] 1 KB 482, CA (affd sub nom *Hart & Co v Michael* (1903) 89 LT 422, HL); *Johnston v Braham and Campbell* [1917] 1 KB 586, CA. Nominal damages only will be awarded where the principal is unable to show that any damage has been suffered: *Carreras Ltd v Levy* (1970) 215 Estates Gazette 707

(misrepresentation as to amount of office space in building to be taken in sub-lease; no damages proved since rent paid might equally represent the market value of the smaller space actually available).

6 Cf *Mainwaring v Brandon* (1818) 2 Moore CP 125, with *Re United Service Co, Johnston's Claim* (1871) 6 Ch App 212.

7 *Hadley v Baxendale* (1854) 9 Exch 341; *Boyd v Fitt* (1864) 11 LT 280. As to the measure of damages in tort and contract see **DAMAGES** vol 12(1) (Reissue) PARAS 851 et seq, 941 et seq.

8 *Salvesen & Co v Rederi Aktiebolaget Nordstjernan* [1905] AC 302, HL; *Cassaboglou v Gibb* (1883) 11 QBD 797, CA; *Johnston v Braham and Campbell* [1917] 1 KB 586, CA. See also *Laskin v Bache & Co Inc* [1972] 1 OR 465, Ont CA (damages recovered in respect of loss of opportunity to sell stock certificates in a declining market where broker failed to obtain possession of certificates).

9 See PARA 78.

10 See *Osman v J Ralph Moss Ltd* [1970] 1 Lloyd's Rep 313, CA, where insurance brokers had grossly misled the principal as to the financial standing of an insurance company, with the result that the principal became uninsured and was convicted for driving while uninsured. Cf *R Leslie Ltd v Reliable Advertising and Addressing Agency Ltd* [1915] 1 KB 652; see also *Askey v Golden Wine Co Ltd* [1948] 2 All ER 35. Cf, as to the right of the agent to an indemnity in respect of payments made under illegal transactions, PARA 113.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/5. RELATIONS BETWEEN PRINCIPAL AND AGENT/(2) DUTIES OF AGENTS TO PRINCIPALS/(iv) Remedies for Default of Agent/87. Claim for account.

## **87. Claim for account.**

Where an agent fails to pay over to his principal on demand money received by him, the principal may bring a claim for money had and received<sup>1</sup>, and may also claim an account<sup>2</sup>.

The relationship of principal and agent ordinarily being fiduciary in character<sup>3</sup>, proceedings for an account lay in the Court of Chancery<sup>4</sup> and are now brought, particularly if the accounts are complicated<sup>5</sup>, by a claim in the Chancery Division<sup>6</sup>. Where the accounts are of a simple nature, they can be taken in an ordinary claim in the Queen's Bench Division<sup>7</sup>. The principal may seek an account of the profits made by an agent from his use of confidential information<sup>8</sup>. It would appear that the court will determine the appropriate remedy in such cases, rather than permitting the principal to elect<sup>9</sup>.

On the taking of an account the agent is entitled to deduct in addition to all authorised expenses any sums due from the principal to the agent<sup>10</sup>, but deduction may not be made until such sums are due<sup>11</sup>. An agent is not entitled to an indemnity in respect of money which he has even with the authority of his principal expended for an unlawful purpose<sup>12</sup>; but where the money has already been paid over to the agent the principal cannot recover it<sup>13</sup> even though the unlawful purpose has not been carried out, unless the principal had withdrawn from the carrying out of the purpose by reason of repentance<sup>14</sup>. Ordinarily, a claim for an account is barred after the expiration of any time limit applicable to the claim which is the basis of the duty to account<sup>15</sup>.

Where an account has been agreed the principal may sue the agent on an account stated<sup>16</sup>. This may take the form of an oral or written acknowledgment from which a debt may be inferred, but the agent may prove that there is no such sum in fact due to his principal<sup>17</sup>; but, if the account takes the form of items on both sides of a written account and a balance is struck, the agent can only dispute such items debited against him in the account as, if paid by him, could have been recovered as on a total failure of consideration<sup>18</sup>.

Settled accounts cannot, as a rule, be reopened<sup>19</sup>, but the principal may obtain leave to surcharge and falsify<sup>20</sup> them<sup>21</sup>. An account does not come within this principle as a settled



account unless there is mutuality, that is two or more parties accounting to each other<sup>22</sup>. On proof of fraud<sup>23</sup> or undue influence<sup>24</sup>, however, the principal is entitled to have settled accounts reopened from the beginning of the agency<sup>25</sup>.

1 See eg *Harsant v Blaine, Macdonald & Co* (1887) 56 LJQB 511, CA; *Mahesan v Malaysia Government Officers' Co-operative Housing Society Ltd* [1979] AC 374, [1978] 2 All ER 405, PC; and PARA 85.

2 The account must not, however, include damages for breach of duty: *Great Western Insurance Co of New York v Cunliffe* (1874) 9 Ch App 525; *Trans Barwil Agencies (UK) Ltd v John S Braid & Co Ltd* 1989 SLT 73, Ct of Sess. It is doubtful whether a court has power to award damages in lieu of an account: see *English v Dedham Vale Properties Ltd* [1978] 1 All ER 382, [1978] 1 WLR 93.

3 See *Makepeace v Rogers* (1865) 4 De GJ & Sm 649, CA; *Padwick v Stanley* (1852) 9 Hare 627; and PARA 73.

4 *Foley v Hill* (1848) 2 HL Cas 28.

5 See *Harrington v Churchward* (1860) 29 LJ Ch 521.

6 See *Leslie v Clifford* (1884) 50 LT 590, DC. As to claims regarding accounts generally see *Practice Direction--Accounts, Inquiries, etc* PD 40A; and **CIVIL PROCEDURE** vol 12 (2009) PARAS 1524-1529.

7 *Foley v Hill* (1848) 2 HL Cas 28; *Barry v Stevens* (1862) 31 Beav 258; *Blyth v Whiffin* (1872) 27 LT 330; *York v Stowers* (1883) Bitt Rep in Ch 2. As to the referral of cases to the Technology and Construction Court see **CIVIL PROCEDURE** vol 12 (2009) PARA 1546.

8 *Peter Pan Manufacturing Corp v Corsettes Silhouette Ltd* [1963] 3 All ER 402, [1964] 1 WLR 96.

9 *English v Dedham Vale Properties Ltd* [1978] 1 All ER 382, [1978] 1 WLR 93.

10 *Dale v Sollet* (1767) 4 Burr 2133. As to the right of the agent to claim expenses after accounts between him and his principal have been settled see *Struthers v Smith* 1913 2 SLT 155.

11 *Wilkinson v North Suburban Properties Ltd* (1959) 174 Estates Gazette 213, CA.

12 *Re Parker* (1882) 21 ChD 408, CA (agent unable to recover illegal election expenses); see also PARA 113.

13 *Bayntun v Cattle* (1833) 1 Mood & R 265.

14 *Harry Parker Ltd v Mason* [1940] 2 KB 590, [1940] 4 All ER 199, CA (conspiracy to make sham bets); *Bigos v Boustead* [1951] 1 All ER 92 (share certificate deposited in breach of exchange control legislation).

15 See the Limitation Act 1980 s 23; and **LIMITATION PERIODS** vol 68 (2008) PARA 1008. See also ss 21(1), 32; and **LIMITATION PERIODS** vol 68 (2008) PARAS 1140 et seq, 1220 et seq. No lapse of time, however, bars the right of a principal to an account of property which the agent holds in a fiduciary capacity for the principal during the continuance of the fiduciary relationship, and where the agent has been guilty of fraud time does not begin to run until after the discovery of the fraud: see ss 21, 32; *North American Land and Timber Co Ltd v Watkins* [1904] 1 Ch 242; affd [1904] 2 Ch 233, CA; and **LIMITATION PERIODS** vol 68 (2008) PARAS 1140 et seq, 1220 et seq.

16 For the right to sue on an account stated see **CONTRACT** vol 9(1) (Reissue) PARAS 1049-1050.

17 *Siqueira v Noronha* [1934] AC 332, PC.

18 *Camillo Tank Steamship Co Ltd v Alexandria Engineering Works* (1921) 38 TLR 134, HL; *Siqueira v Noronha* [1934] AC 332, PC.

19 *Parkinson v Hanbury* (1867) LR 2 HL 1. As to the reopening of settled accounts see **EQUITY** vol 16(2) (Reissue) PARA 453.

20 'Falsify' is here used with its meaning of 'show to be false'.

21 *Mozeley v Cowie* (1877) 47 LJ Ch 271; *Cheese v Keen* [1908] 1 Ch 245; and see *Shaw v Picton* (1825) 4 B & C 715; *Cave v Mills* (1862) 7 H & N 913.

22 *Anglo-American Asphalt Co Ltd v Crowley Russell & Co Ltd* [1945] 2 All ER 324; and distinguish *Hunter v Belcher* (1864) 2 De GJ & Sm 194, CA.

- 23 *Clarke v Tipping* (1846) 9 Beav 284; *Walsham v Stainton* (1863) 1 De GJ & Sm 678.
- 24 *Watson v Rodwell* (1879) 11 ChD 150, CA.
- 25 *Stainton v Carron Co* (1857) 24 Beav 346; *Williamson v Barbour* (1877) 9 ChD 529.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/5. RELATIONS BETWEEN PRINCIPAL AND AGENT/(2) DUTIES OF AGENTS TO PRINCIPALS/(iv) Remedies for Default of Agent/88. Interest.

## 88. Interest.

Interest is payable by an agent in respect of money received by him on his principal's behalf<sup>1</sup>, under a contract express or implied, or where there has been some default on his part<sup>2</sup>, such as a dealing with the money in breach of duty<sup>3</sup>, or a failure to pay it over at the principal's request<sup>4</sup>, in which cases interest is payable from the date of default<sup>5</sup>. The agent must also pay interest in all cases of fraud<sup>6</sup>, and on all bribes<sup>7</sup> and secret profits<sup>8</sup> received by him during his agency. The court has a wide statutory discretion to award interest in proceedings for the recovery of any debt<sup>9</sup>.

1 If money is received by him as a stakeholder, however, he is not liable to pay interest on it: see *Harington v Hoggart* (1830) 1 B & Ad 577. Where an estate agent received a pre-contract deposit, which he held as stakeholder, and which, when he believed the contract had ceased to be conditional, he placed on deposit, he was entitled to retain the interest earned on the purchaser's money before the time when the intending purchaser withdrew from the contract: see *Potters v Loppart* [1973] Ch 399, [1973] 1 All ER 658, where Pennycuik V-C justified the retention as a reward for the estate agent's trouble and also as recompense for loss of prospect of earning commission on sale during the period concerned. As to stakeholders see further **AUCTION** vol 2(3) (Reissue) PARA 250; **CONTRACT** vol 9(1) (Reissue) PARA 1143.

2 *Webster v British Empire Mutual Life Assurance Co* (1880) 15 ChD 169, CA.

3 As by employing it in his own business (*Rogers v Boehm* (1799) 2 Esp 702; *Burdick v Garrick* (1870) 5 Ch App 233); but contrast *Lord Chedworth v Edwards* (1802) 8 Ves 46.

4 *Edgell v Day* (1865) LR 1 CP 80; *Harsant v Blaine, Macdonald & Co* (1887) 56 LJQB 511, CA (decided under the Civil Procedure Act 1833 s 28 (repealed)). Merely retaining money which the agent ought to pay over, but which he has never been required to pay, is not sufficient to entitle the principal to interest, in the absence of fraud: *Turner v Burkinshaw* (1867) 2 Ch App 488.

5 *Edgell v Day* (1865) LR 1 CP 80; *Barclay v Harris and Cross* (1915) 85 LJB 115.

6 *Earl Hardwicke v Vernon* (1808) 14 Ves 504.

7 *Boston Deep Sea Fishing and Ice Co v Ansell* (1888) 39 ChD 339, CA. See further PARA 94.

8 *Nant-y-glo and Blaina Ironworks Co v Grave* (1878) 12 ChD 738.

9 See the Supreme Court Act 1981 s 35A; and **DAMAGES** vol 12(1) (Reissue) PARA 848. As from a day to be appointed, the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59, Sch 11 para 1. At the date at which this volume states the law no such day had been appointed.

## UPDATE

## 88 Interest

NOTE 9--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/5. RELATIONS BETWEEN PRINCIPAL AND AGENT/(2) DUTIES OF AGENTS TO PRINCIPALS/(v) Disclosure by Agent/89. Conflict of interest.

## (v) Disclosure by Agent

### 89. Conflict of interest.

An agent will not be allowed to put his duty in conflict with his interest<sup>1</sup>, and therefore he must not enter into any transaction likely to produce that result<sup>2</sup>, unless he has first made to his principal the fullest disclosure of the exact nature of his interest, and the principal has assented<sup>3</sup>. An agent does not discharge his duty in this behalf merely by disclosing that he has an interest<sup>4</sup>, or by making statements which might put the principal on inquiry<sup>5</sup>. In particular, notwithstanding any usage to the contrary<sup>6</sup>, he must not sell his own property to the principal<sup>7</sup>, nor buy the principal's property<sup>8</sup>, nor, by acting as agent for the principal and the other contracting party, obtain remuneration from both, without the knowledge of the principal<sup>9</sup>, and to act as agent for both principals without the knowledge and consent of the first principal will amount to a breach of duty to that principal<sup>10</sup>.

To the rule that an agent may not buy his principal's property there is an apparent exception in the case of a broker who has a right, or is under a duty, to close his principal's outstanding account of transactions entered into by him on his principal's behalf. The broker may ascertain (and realise) the value of the shares or commodity by a simultaneous sale and repurchase on his own account, provided that the transactions are bona fide, at fair market price and he makes no secret profit<sup>11</sup>.

1 *Bank of Upper Canada v Bradshaw* (1867) LR 1 PC 479; *Parker v McKenna* (1874) 10 Ch App 96; *Tiessen v Henderson* [1899] 1 Ch 861; *King, Viall and Benson v Howell* (1910) 27 TLR 114, CA. This rule will not prohibit the agent from canvassing, after notice has been given terminating the agency agreement, for custom in respect of a period after termination, where such canvassing is not in itself a breach of the agreement: *Julien Praet et Cie SA v HG Poland Ltd, Poland v Julien Praet et Cie SA* [1962] 1 Lloyd's Rep 566.

2 For cases where the transaction is entered into with a person with whom he is dealing on his principal's behalf see PARA 93.

3 *Gwatkin v Campbell* (1854) 1 Jur NS 131; *Glasgow Assurance Corp'n Ltd v William Symondson & Co* (1911) 104 LT 254; *Ellis & Co's Trustee v Watsham* (1923) 155 LT Jo 363; *Thornton Hall & Partners v Wembley Electrical Appliances Ltd* [1947] 2 All ER 630, CA. The rule applies equally to persons who purport to act as agents and subsequently profit by use of information obtained during the purported agency: see *Boardman v Phipps* [1967] 2 AC 46, [1966] 3 All ER 721, HL; and PARA 76.

4 *Imperial Mercantile Credit Association v Coleman* (1873) LR 6 HL 189; *Alexander v Automatic Telephone Co* [1900] 2 Ch 56, CA; *Gluckstein v Barnes* [1900] AC 240, HL; *Costa Rica Rly Co v Forwood* [1901] 1 Ch 746, CA. As to the statutory duty of a company director to disclose his interest in contracts with the company see the Companies Act 1985 s 317; the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule Table A reg 85; and COMPANIES vol 14 (2009) PARAS 550, 555, 558.

5 *Dunne v English* (1874) LR 18 Eq 524; and see *Swale v Ipswich Tannery Ltd* (1906) 11 Com Cas 88.

6 *Robinson v Mollett* (1875) LR 7 HL 802; *Hamilton v Young* (1881) LR 7 Ir 289.

7 *Gillett v Peppercorne* (1840) 3 Beav 78; *Rothschild v Brookman* (1831) 2 Dow & Cl 188, HL; *Skelton v Wood* (1894) 71 LT 616, DC; *King, Viall and Benson v Howell* (1910) 27 TLR 114, CA; *Kuhlitz v Lambert Bros Ltd* (1913) 108 LT 565; *Armstrong v Jackson* [1917] 2 KB 822; and see PARA 1 text and note 10.

8 *McPherson v Watt* (1877) 3 App Cas 254, HL; *Re Pemberton, ex p Huth* (1840) 4 Deac 294; *Lowther v Lord Lowther* (1806) 13 Ves 95; *Livingstone v Ross* [1901] AC 327, PC; *Patten v Hamilton* [1911] 1 IR 46, CA; *Coats'*

*Trustees* 1914 SC 723, Ct of Sess. An agent who is also given an option may purchase: *Kelly v Enderton* [1913] AC 191, PC.

9 *Fullwood v Hurley* [1928] 1 KB 498, CA; *Harrods Ltd v Lemon* [1931] 2 KB 157, CA.

10 The usage whereby insurance brokers, who are the agents of the insured, act for certain purposes, including the appointment of assessors of claims and the receipt of assessors' reports with strict instructions not to disclose the contents to the insured, as the agents of the underwriters, has been the subject of disapproval by the courts: see *Anglo-African Merchants Ltd v Bayley* [1970] 1 QB 311, [1969] 2 All ER 421; *North and South Trust Co v Berkeley*, *Berkeley v North and South Trust Co* [1971] 1 All ER 980, [1971] 1 WLR 470 (although to act as agents for the insurer is a breach of duty to the principal, the principal is not thereby entitled to documents confidential to the insurers which come into the hands of the agents in the course of such breach).

11 *Macoun v Erskine, Oxenford & Co* [1901] 2 KB 493, CA; *Erskine, Oxenford & Co v Sachs* [1901] 2 KB 504, CA; *Re Finlay, C S Wilson & Co v Finlay* [1913] 1 Ch 247; affd [1913] 1 Ch 565, CA; *Christoforides v Terry* [1924] AC 566, HL.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/5. RELATIONS BETWEEN PRINCIPAL AND AGENT/(2) DUTIES OF AGENTS TO PRINCIPALS/(v) Disclosure by Agent/90. Effect of non-disclosure.

## 90. Effect of non-disclosure.

In all other transactions<sup>1</sup> with the principal, the agent must disclose every material fact which is or ought to be known by him, if it would be likely to operate upon the principal's judgment<sup>2</sup>. If this is not done, the fairness of the transaction is immaterial<sup>3</sup>, and it is voidable at the principal's option<sup>4</sup>, and the principal may obtain rescission of the transaction after it has been completely executed without the necessity of establishing fraud on the part of the agent<sup>5</sup>.

The principal's remedies in cases of fraudulent concealment, fraud or mistake do not become statute barred until six years after he has discovered, or could with reasonable diligence have discovered, the relevant circumstances upon which his claim is based<sup>6</sup>.

1 *Lord Selsey v Rhoades* (1824) 2 Sim & St 41. The rule applies to gifts: see *Hunter v Atkins* (1834) 3 My & K 113; as to gifts between solicitor and client see **LEGAL PROFESSIONS** vol 66 (2009) PARAS 801-803.

2 *Dunne v English* (1874) LR 18 Eq 524; *Charter v Trevelyan* (1844) 11 Cl & Fin 714; *Savery v King* (1856) 5 HL Cas 627; *Luddy's Trustee v Peard* (1886) 33 ChD 500; *Imeson v Lister* (1920) 149 LT Jo 446; *Demerara Bauxite Co v Hubbard* [1923] AC 673, PC; *Heath v Parkinson* (1926) 136 LT 128. The test is what a reasonable man would consider material in the ordinary course of business: *Payne v Lewis and Peat* [1917] WN 195. There is no duty on an agent to communicate an offer which the principal had previously told him would not be accepted: *Burchell v Gowrie and Blockhouse Collieries Ltd* [1910] AC 614, PC.

3 *Gillett v Peppercorne* (1840) 3 Beav 78; *Aberdeen Rly Co v Blaikie Bros* (1854) 2 Eq Rep 1281, HL; *Transvaal Lands Co v New Belgium (Transvaal) Land and Development Co* [1914] 2 Ch 488, CA; *Imeson v Lister* (1920) 149 LT Jo 446.

4 *Houldsworth v City of Glasgow Bank* (1880) 5 App Cas 317, HL, per Lord Cairns; *Re Cape Breton Co* (1885) 29 ChD 795, CA; *Gillett v Peppercorne* (1840) 3 Beav 78; *Oliver v Court* (1820) Dan 301; *Great Luxembourg Rly Co v Magnay (No 2)* (1858) 25 Beav 586; *Moody v Cox and Hatt* [1917] 2 Ch 71, CA.

5 *Armstrong v Jackson* [1917] 2 KB 822. The remedy of rescission is now available in respect of all contracts induced by misrepresentation, whether or not the misrepresentation has become a term of the contract or the contract has been performed, without proof of fraud: see the Misrepresentation Act 1967 s 1; and **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARAS 704, 817. Where rescission is inappropriate, however, or where additional loss has been suffered, damages may be awarded, without proof of fraud: see s 2; **CONTRACT** vol 9(1) (Reissue) PARAS 767-768; **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 834.

6 *Oelkers v Ellis* [1914] 2 KB 139; Limitation Act 1980 s 32. The title of innocent purchasers for value is, however, protected: see s 32(3), (4); and **LIMITATION PERIODS** vol 68 (2008) PARA 1220 et seq.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/5. RELATIONS BETWEEN PRINCIPAL AND AGENT/(2) DUTIES OF AGENTS TO PRINCIPALS/(vi) Secret Profits and Bribes/91. General rule.

## (vi) Secret Profits and Bribes

### 91. General rule.

An agent must not, without the knowledge of his principal<sup>1</sup>, acquire any profit<sup>2</sup> or benefit<sup>3</sup> from his agency<sup>4</sup> other than that contemplated by the principal at the time of making the contract of agency<sup>5</sup>. This rule may apply even though at the time of the transaction itself the agency has ceased<sup>6</sup>. The rule applies in spite of the fact that the agent has done his best under the circumstances<sup>7</sup> or incurred a possibility of loss<sup>8</sup>, or that the principal has in fact received the benefit he himself contemplated from the transaction<sup>9</sup>. All such profits and the value of such benefits must be paid over to the principal<sup>10</sup>.

1 *Re Haslam and Hier-Evans* [1902] 1 Ch 765, CA; *Ritchie v Couper* (1860) 28 Beav 344; *Jordy v Vanderpump* (1920) 64 Sol Jo 324; see also *Darvell v Basildon Development Corpn* (1969) 211 Estates Gazette 33 (full knowledge by principal of sale to estate agent's daughter; good title held to pass to enable daughter to obtain specific performance of later sale).

2 *Thompson v Meade* (1891) 7 TLR 698.

3 *Fawcett v Whitehouse* (1829) 1 Russ & M 132; *Tarkwa Main Reef Ltd v Merton* (1903) 19 TLR 367.

4 *Erskine, Oxenford & Co v Sachs* [1901] 2 KB 504, CA; cf *Kirkham v Peel* (1881) 44 LT 195, CA; and see *Williamson v Hine Bros* [1891] 1 Ch 390; *Re Finlay, C S Wilson & Co v Finlay* [1913] 1 Ch 247 (affd [1913] 1 Ch 565, CA); *Kitson v P S King & Son Ltd* (1919) 36 TLR 162; *Grinsted v Hadrill* [1953] 1 All ER 1188, [1953] 1 WLR 696, CA.

5 See the cases cited in notes 2-4. This rule applies even though the agency is gratuitous: *Turnbull v Garden* (1869) 38 LJ Ch 331. The same rule applies to sub-agents where a fiduciary relation is established: *Powell and Thomas v Evan Jones & Co* [1905] 1 KB 11, CA. For the application of the rule to house agents acting as repairers see *Sherrard v Barron* [1923] 1 IR 21, CA; and to directors of a company, see *Bath v Standard Land Co Ltd* [1911] 1 Ch 618, CA; and **COMPANIES** vol 14 (2009) PARA 590; as to its application to agents acting for a trust and persons in a similar position see *Boardman v Phipps* [1967] 2 AC 46, [1966] 3 All ER 721, HL; and **TRUSTS** vol 48 (2007 Reissue) PARA 685.

See also *Stubbs v Slater* [1910] 1 Ch 632, CA (sums deducted by broker under usage of stock exchange for carrying over although not justifiable as contractual remuneration could be retained as reasonable remuneration on quantum meruit).

6 *Carter v Palmer* (1842) 8 Cl & Fin 657, HL; *Regier v Campbell-Stuart* [1939] Ch 766, [1939] 3 All ER 235; where, however, the profit is made after the termination of the agency by means of information obtained during the agency but not secret or confidential, there will be no liability to account for the profit: *Nordisk Insulinlaboratorium v Gorgate Products Ltd (sued as C L Bencard (1934) Ltd)* [1953] Ch 430, [1953] 1 All ER 986, CA.

7 *Shallcross v Oldham* (1862) 2 John & H 609.

8 *Williams v Stevens* (1866) LR 1 PC 352.

9 *De Bussche v Alt* (1878) 8 ChD 286, CA.

10 *Thompson v Meade* (1891) 7 TLR 698; *Regier v Campbell-Stuart* [1939] Ch 766, [1939] 3 All ER 235; see also *Brown v IRC* [1965] AC 244, [1964] 3 All ER 119, HL. The agent is still, however, entitled to retain the normal commission, in the absence of fraud: see *Hippisley v Knee Bros* [1905] 1 KB 1; *Nitedals Taendstikfabrik v Bruster* [1906] 2 Ch 671.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/5. RELATIONS BETWEEN PRINCIPAL AND AGENT/(2) DUTIES OF AGENTS TO PRINCIPALS/(vi) Secret Profits and Bribes/92. Agent to purchase.

## 92. Agent to purchase.

Where an agent who is employed to buy property on his principal's behalf sells his own to the principal, and thereby makes a profit, the principal, in lieu of rescinding the sale, may affirm it<sup>1</sup>. If rescission is no longer possible, the contract remains in existence<sup>2</sup>. In either case he may then recover from the agent the full amount of the profit received by the latter, together with interest<sup>3</sup>.

Where the agent is employed to buy a particular property<sup>4</sup> in which he in fact had an interest before accepting the agency, and sells it to his principal during the agency without disclosing his interest, the principal may affirm or rescind the contract, but, if he affirms it, he cannot also claim the profits<sup>5</sup> in the absence of any underhand dealing<sup>6</sup>.

1 The onus of maintaining that the sale has been affirmed lies on the agent: *Cavendish-Bentinck v Fenn* (1887) 12 App Cas 652, HL.

2 See *Re Leeds and Hanley Theatres of Varieties Ltd* [1902] 2 Ch 809, CA (rescission impossible because property sold by mortgagees to third party); and see *Re Cape Breton Co* (1885) 29 ChD 795, CA (property sold by company to third party); affd on other grounds sub nom *Cavendish-Bentinck v Fenn* (1887) 12 App Cas 652, HL.

3 *Bentley v Craven* (1853) 18 Beav 75; *Tyrrell v Bank of London* (1862) 10 HL Cas 26; *Benson v Heathorn* (1842) 1 Y & C Ch Cas 326; *Massey v Davies* (1794) 2 Ves 317.

4 Quaere whether the same rule applies where no particular property is indicated; see *Re Cape Breton Co* (1885) 29 ChD 795, CA; affd on other grounds sub nom *Cavendish-Bentinck v Fenn* (1887) 12 App Cas 652, HL.

5 *Re Cape Breton Co* (1885) 29 ChD 795, CA (affd on another ground sub nom *Cavendish-Bentinck v Fenn* (1887) 12 App Cas 652, HL), approved in *Burland v Earle* [1902] AC 83, PC. Cf *Cook v Deeks* [1916] 1 AC 554, PC.

6 *Kimber v Barber* (1872) 8 Ch App 56.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/5. RELATIONS BETWEEN PRINCIPAL AND AGENT/(2) DUTIES OF AGENTS TO PRINCIPALS/(vi) Secret Profits and Bribes/93. Bribe or secret commission.

## 93. Bribe or secret commission.

A bribe or secret commission is a profit or benefit received by the agent from the third person with whom the agent is dealing on his principal's behalf without the knowledge or consent of the principal, or which was not contemplated by the principal at the creation of the agency. The receipt of a bribe, whether in money<sup>1</sup> or otherwise<sup>2</sup>, is a breach of duty. The motive of the donor is immaterial since there is an irrebuttable presumption that the gift was made with the intention that the agent should be influenced by it<sup>3</sup>, and the court will not inquire whether the agent was influenced by the bribe in a way prejudicial to his principal's interest<sup>4</sup>. It is immaterial that the principal's interest is not involved<sup>5</sup>.

Where, however, the principal leaves the agent to look to the third party for his remuneration, or knows that he will receive something from the third party, the agent is entitled to receive

and retain such commissions as are usual and customary, and the principal cannot object merely on the ground that he was unaware of the actual amount thereof<sup>6</sup>.

1 *Re Canadian Oil Works Corpn, Hay's Case* (1875) 10 Ch App 593; *Boston Deep Sea Fishing and Ice Co v Ansell* (1888) 39 ChD 339, CA; *Fyffes Group Ltd v Templeman* [2000] 2 Lloyd's Rep 643.

2 *Nant-y-glo and Blaina Ironworks Co v Grave* (1878) 12 ChD 738; *Re Morvah Consols Tin Mining Co, McKay's Case* (1875) 2 ChD 1, CA.

3 *Hovenden & Sons v Millhoff* (1900) 83 LT 41, CA; *Re A Debtor (No 229 of 1927)* [1927] 2 Ch 367, CA; *Industries and General Mortgage Co Ltd v Lewis* [1949] 2 All ER 573, [1949] WN 333; *Taylor v Walker* [1958] 1 Lloyd's Rep 490.

4 *Harrington v Victoria Graving Dock Co* (1878) 3 QBD 549.

5 *A-G v Goddard* (1929) 98 LJB 743; *Reading v A-G* [1951] AC 507, [1951] 1 All ER 617, HL.

6 *Great Western Insurance Co of New York v Cunliffe* (1874) 9 Ch App 525; *Baring v Stanton* (1876) 3 ChD 502, CA; *Lord Norreys v Hodgson* (1897) 13 TLR 421; *Bow's Emporium Ltd v A R Brett & Co* (1927) 44 TLR 194, HL. Cf *E Green & Son Ltd v G Tughan & Co* (1913) 30 TLR 64; and see *Fyffes Group Ltd v Templeman* [2000] 2 Lloyd's Rep 643.

## UPDATE

### 93 Bribe or secret commission

NOTE 1--See *Imageview Management Ltd v Jack* [2009] EWCA Civ 63, [2009] 2 All ER 666 (agent acted in breach of fiduciary duty owed to the principal).

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/5. RELATIONS BETWEEN PRINCIPAL AND AGENT/(2) DUTIES OF AGENTS TO PRINCIPALS/(vi) Secret Profits and Bribes/94. Effect of receipt of bribe by agent.

### 94. Effect of receipt of bribe by agent.

On discovering the receipt of a bribe the principal may instantly dismiss the agent<sup>1</sup>, and, if he has already been dismissed, may justify the dismissal on that ground, even though the bribery was not discovered till after the dismissal<sup>2</sup>. The agent forfeits any commission in respect of the transaction<sup>3</sup>, and becomes liable<sup>4</sup> to his principal for the amount of the bribe, if in money<sup>5</sup>, or for the value of the property so received by him<sup>6</sup>, such value being measured by the highest value which the property might have fetched whilst in his possession<sup>7</sup>. Interest also is payable from the date when the bribe was received<sup>8</sup>. In addition, the agent is liable, jointly and severally with the briber, for any loss actually sustained by the principal in consequence of any breach of duty on the agent's part<sup>9</sup>; and both he and the briber may be dealt with by criminal proceedings<sup>10</sup>. The principal is entitled to treat the transaction entered into as void ab initio<sup>11</sup>.

1 See *Swale v Ipswich Tannery Ltd* (1906) 11 Com Cas 88; *Temperley v Blackrod Manufacturing Co Ltd* (1907) 71 JP Jo 341. Where the agent is also an employee, the statutory provisions as to notice periods do not affect the right to terminate the contract by reason of conduct which would apart from that Act entitle the other party to terminate: see the Employment Rights Act 1996 s 86, s 210, s 211; and **EMPLOYMENT** vol 39 (2009) PARA 105; **EMPLOYMENT** vol 40 (2009) (Reissue) PARAS 692-693. The principal also has the right to avoid any contract or transaction entered into by the agent in consequence of, or in connection with the bribe: see PARA 139.

2 *Boston Deep Sea Fishing and Ice Co v Ansell* (1888) 39 ChD 339, CA; *Swale v Ipswich Tannery Co* (1906) 11 Com Cas 88. To accept a denial of guilt from an agent who has in fact accepted a bribe is not condonation: *Federal Supply and Cold Storage Co of South Africa v Angehrn and Piel* (1910) 80 LJPC 1. The proposition set out

in the text to this note must presumably be taken not to apply where the agent is an employee of the principal, in which case the law relating to termination of employment (see **EMPLOYMENT** vol 40 (2009) PARA 679 et seq) applies.

3 *Andrews v Ramsay & Co* [1903] 2 KB 635; *Price v Metropolitan House Investment and Agency Co Ltd* (1907) 23 TLR 630, CA. See also *E Green & Son Ltd v G Tughan & Co* (1913) 30 TLR 64.

4 The relation has been held to be that of debtor and creditor, and not of trustee and cestui que trust: *Lister & Co v Stubbs* (1890) 45 ChD 1, CA. However, this decision has been much criticised and may be doubted: see *A-G for Hong Kong v Reid* [1994] 1 AC 324, [1994] 1 All ER 1, PC (bribe and property representing bribe held on constructive trust for person injured). See also *Powell and Thomas v Evan Jones & Co* [1905] 1 KB 11, CA.

5 *Salford Corp v Lever* [1891] 1 QB 168, CA; *Re Canadian Oil Works Corp, Hay's Case* (1875) 10 Ch App 593; *A-G v Goddard* (1929) 98 LJB 743; *Reading v A-G* [1951] AC 507, [1951] 1 All ER 617, HL; *Mahesan v Malaysia Government Officers' Co-operative Housing Society Ltd* [1979] AC 374, [1978] 2 All ER 405, PC.

6 *Re Morvah Consols Tin Mining Co, McKay's Case* (1875) 2 ChD 1, CA; *Nant-y-glo and Blaina Ironworks Co v Grave* (1878) 12 ChD 738; *Re Caerphilly Colliery Co, Pearson's Case* (1877) 5 ChD 336, CA.

7 *Re Morvah Consols Tin Mining Co, McKay's Case* (1875) 2 ChD 1, CA.

8 *Boston Deep Sea Fishing and Ice Co v Ansell* (1888) 39 ChD 339, CA (at 5%); *Nant-y-glo and Blaina Ironworks Co v Grave* (1878) 12 ChD 738 (4%). Outside the field of agency the modern cases show a higher trend: *De Maurier (Jewels) Ltd v Bastian Insurance Co Ltd and Coronet Insurance Co* [1967] 2 Lloyd's Rep 550 (7%); *The Mecca* [1968] P 665, [1968] 2 All ER 731 (5½%); *Jefford v Gee* [1970] 2 QB 130, [1970] 1 All ER 1202, CA (6%). It is submitted that an award of interest against an unscrupulous agent would be at not less than a 'realistic rate' (see *Jefford v Gee*) for the time being.

9 *Salford Corp v Lever* [1891] 1 QB 168, CA; *Morgan v Elford* (1876) 4 ChD 352, CA. The agent is not, however, liable for both the amount of the bribe and the loss sustained: *Mahesan v Malaysia Government Officer's Co-operative Housing Society Ltd* [1979] AC 374, [1978] 2 All ER 405, PC.

10 Ie for conspiracy to defraud (*R v Barber* (1887) 3 TLR 491), or under the Public Bodies Corrupt Practices Act 1889 (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 529) or the Prevention of Corruption Acts 1906 and 1916 (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARAS 321, 529-530). As to corrupt practices at parliamentary and local elections see **ELECTIONS AND REFERENDUMS** vol 15(3) (2007 Reissue) PARAS 707 et seq, 885 et seq.

11 *Logicrose Ltd v Southend United Football Club Ltd* [1988] 1 WLR 1256.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/5. RELATIONS BETWEEN PRINCIPAL AND AGENT/(2) DUTIES OF AGENTS TO PRINCIPALS/(vii) Estoppel in Respect of Rights and Title of Principal/95. Denial of principal's rights.

## **(vii) Estoppel in Respect of Rights and Title of Principal**

### **95. Denial of principal's rights.**

Where a person has admittedly acted as agent on a principal's behalf<sup>1</sup> in any transaction, he is estopped from denying the rights which have accrued to his principal in consequence thereof, and from setting up any claims adverse thereto, whether in himself<sup>2</sup> or third parties<sup>3</sup>.

This rule applies in particular in the case of goods which have been entrusted to him<sup>4</sup>, or in respect of which he has acknowledged the title of his principal, whether in actual possession of them or not<sup>5</sup>. Where, however, the adverse claim is made by a third person, the agent may set up the latter's title, if he has actually handed over the goods to him or is acting by his authority and on his behalf<sup>6</sup>, provided that he had no knowledge of the claim when he received the goods or attorned to his principal<sup>7</sup>. If he is acting as agent for both parties, he may elect between them<sup>8</sup>.



- 1 *Sheridan v New Quay Co* (1858) 4 CBNS 618; *A-G v London Corp'n* (1850) 2 Mac & G 247.
- 2 *Lyell v Kennedy* (1889) 14 App Cas 437, HL; *Williams v Pott* (1871) LR 12 Eq 149; *Moore v Peachey* (1891) 7 TLR 748.
- 3 *Eames v Hacon* (1881) 18 ChD 347, CA; *Dixon v Hammond* (1819) 2 B & Ald 310; *Blaustein v Maltz, Mitchell & Co* [1937] 2 KB 142, [1937] 1 All ER 497, CA.
- 4 *Zulueta v Vinent* (1852) 1 De GM & G 315.
- 5 *Henderson & Co v Williams* [1895] 1 QB 521, CA; *Evans and Evans v Nichol and Nichol* (1841) 4 Scott NR 43.
- 6 *Biddle v Bond* (1865) 6 B & S 225; *Rogers, Sons & Co v Lambert & Co* [1891] 1 QB 318, CA. The principle of these cases does not extend to money due on an account: see *Blaustein v Maltz, Mitchell & Co* [1937] 2 KB 142, [1937] 1 All ER 497, CA.
- 7 *Biddle v Bond* (1865) 6 B & S 225; *Re Sadler, ex p Davies* (1881) 19 ChD 86, CA.
- 8 *Shee v Clarkson* (1810) 12 East 507.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/5. RELATIONS BETWEEN PRINCIPAL AND AGENT/(2) DUTIES OF AGENTS TO PRINCIPALS/(vii) Estoppel in Respect of Rights and Title of Principal/96. Agent cannot acquire title against principal.

## 96. Agent cannot acquire title against principal.

An agent in possession of property as agent will not be permitted to deny that his possession is that of his principal<sup>1</sup>. He is therefore estopped from setting up a statutory title against the principal<sup>2</sup>, or maintaining his own title as true owner against the statutory title acquired by his principal through him<sup>3</sup>. If he purchases land and has the legal estate conveyed to him, he will not be permitted to plead the absence of a written declaration of trust<sup>4</sup>, and, if he refuses to reconvey the land to his principal, he will be considered to hold it in trust for his principal<sup>5</sup>. Similarly, if money is paid to him by a third person, he will not be permitted to set up the illegality or nullity of the contract under which he received it<sup>6</sup>.

- 1 The possession must be as agent: *White v Bayley* (1861) 10 CBNS 227; cf *Bell v Marsh* [1903] 1 Ch 528, CA; *Markwick v Hardingham* (1880) 15 ChD 339, CA.
- 2 *Lyell v Kennedy* (1889) 14 App Cas 437, HL; and cf *Ward v Carttar* (1865) LR 1 Eq 29.
- 3 *Williams v Pott* (1871) LR 12 Eq 149.
- 4 A written declaration is normally required by the Law of Property Act 1925 s 53(1)(b) (see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARAS 24, 147-148; **POWERS** vol 36(2) (Reissue) PARA 265; **TRUSTS** vol 48 (2007 Reissue) PARA 644), although that requirement may not be used as an instrument of fraud (see *Rochefoucauld v Boustead* [1897] 1 Ch 196, CA; see also *Hodgson v Marks* [1971] Ch 892, [1970] 3 All ER 513; revsd on another point [1971] Ch 892, [1971] 2 All ER 684, CA).
- 5 *Longfield Parish Council v Robson* (1913) 29 TLR 357; and see PARA 77.
- 6 See PARA 85.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/5. RELATIONS BETWEEN PRINCIPAL AND AGENT/(2) DUTIES OF AGENTS TO PRINCIPALS/(viii) Committal of Defaulting Agent/97. Committal.

## (viii) Committal of Defaulting Agent

### 97. Committal.

Whenever an agent, who has received money on behalf of his principal in a fiduciary capacity, fails to comply with an order of the court to pay over the money, he becomes liable to committal, even though he has parted with the money or become bankrupt or insolvent<sup>1</sup>.

1 See the Debtors Act 1869 s 4; *Crowther v Elgood* (1887) 34 ChD 691, CA; and **CONTEMPT OF COURT** vol 9(1) (Reissue) PARA 485 et seq. Although not formally abolished, the remedy of attachment (referred to in the Debtors Act 1869) is now obsolete and all cases of criminal contempt are punishable by committal, as to which see **CONTEMPT OF COURT** vol 9(1) (Reissue) PARA 491 et seq. As to the criminal liability of an agent who misappropriates his principal's money or property see the Theft Act 1968 ss 1-7; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 282 et seq.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/5. RELATIONS BETWEEN PRINCIPAL AND AGENT/(2) DUTIES OF AGENTS TO PRINCIPALS/(ix) Co-agents and Sub-agents/98. Co-agents and sub-agents.

## (ix) Co-agents and Sub-agents

### 98. Co-agents and sub-agents.

An agent is under no responsibility to his principal for the acts or defaults<sup>1</sup> of his co-agents, except where they are his partners<sup>2</sup>, unless he expressly or tacitly authorised such acts or defaults<sup>3</sup>.

An agent is, however, liable for the acts<sup>4</sup> and defaults<sup>5</sup> of his sub-agents even though their employment was authorised by his principal<sup>6</sup>, and he must account to his principal for all money received by them<sup>7</sup>.

1 *Lucas v Fitzgerald* (1903) 20 TLR 16; *Land Credit Co of Ireland v Lord Fermoy* (1870) 5 Ch App 763; *Cullerne v London and Suburban General Permanent Building Society* (1890) 25 QBD 485, CA.

2 See *Hamlyn v John Houston & Co* [1903] 1 KB 81, CA.

3 *Cargill v Bower* (1878) 10 ChD 502.

4 *Re Mutual Aid Permanent Benefit Building Society, ex p James* (1883) 49 LT 530; *Swire v Francis* (1877) 3 App Cas 106, PC; but see the doubt expressed by Atkin LJ in *Thomas Cheshire & Co v Vaughan Bros & Co* [1920] 3 KB 240 at 259, CA.

5 *Collins v Griffin* (1734) Barnes 37; *Mackersy v Ramsays, Bonars & Co* (1843) 9 Cl & Fin 818, HL.

6 *Skinner & Co v Weguelin, Eddowes & Co* (1882) 1 Cab & El 12. This does not apply when there is privity of contract between the sub-agent and the principal; see PARAS 54-56.

7 *Matthews v Haydon* (1796) 2 Esp 509; *Mackersy v Ramsays, Bonars & Co* (1843) 9 Cl & Fin 818, HL; *Re Mitchell, Mitchell v Mitchell* (1884) 54 LJ Ch 342.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/5. RELATIONS BETWEEN PRINCIPAL AND AGENT/(3) RIGHTS OF AGENT AGAINST PRINCIPAL/(i) Basic Principles/99. Derivation of agent's rights.

### (3) RIGHTS OF AGENT AGAINST PRINCIPAL

#### (i) Basic Principles

##### 99. Derivation of agent's rights.

The rights of an agent against his principal flow from the principles:

- 28 (1) that an agent, as the representative of his principal and acting wholly on his behalf, is entitled to be indemnified for such liabilities incurred and losses suffered as were in contemplation when the agency was undertaken, or as were stipulated by the contract of agency<sup>1</sup>; and
- 29 (2) that, where he is an agent for reward, his principal must not wrongfully hinder his opportunity of earning the reward<sup>2</sup>.

In the light of these main principles the agent's rights are to be discovered by reference to the terms, express or implied, of the contract between him and his principal<sup>3</sup>. The rights of an agent are also now varied and supplemented in relation to certain commercial agents<sup>4</sup>.

1 See PARAS 111-112.

2 See PARA 108.

3 See generally PARA 100 et seq.

4 I.e. where the Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, apply. As to the meaning of 'commercial agent', and as to where those Regulations apply, see PARA 72. As to their effect on the rights of agents see PARA 101 et seq.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/5. RELATIONS BETWEEN PRINCIPAL AND AGENT/(3) RIGHTS OF AGENT AGAINST PRINCIPAL/(i) Basic Principles/100. Agent's right to account.

##### 100. Agent's right to account.

An agent has a right to have an account taken, and where the accounts are of a simple nature they can be taken in an ordinary claim in the Queen's Bench Division<sup>1</sup>.

1 *Padwick v Hurst* (1854) 18 Beav 575. As to claims regarding accounts generally see *Practice Direction--Accounts, Inquiries, etc* PD 40A; and **CIVIL PROCEDURE** vol 12 (2009) PARAS 1524-1529. For the right to sue on an account stated see **CONTRACT** vol 9(1) (Reissue) PARAS 1049-1050. As to the reopening of settled accounts see **EQUITY** vol 16(2) (Reissue) PARA 453. For a consideration of the principal's right to an account against the agent see PARA 87. Where the accounts are more complicated, the claim will generally proceed in the Chancery Division; see PARA 87.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/5. RELATIONS BETWEEN PRINCIPAL AND AGENT/(3) RIGHTS OF AGENT AGAINST PRINCIPAL/(ii) Remuneration/101. Contractual basis of right.

## (ii) Remuneration

### 101. Contractual basis of right.

An agent has no right to receive remuneration from his principal unless there is a contract, express or implied, to that effect<sup>1</sup>. Where the parties have made an express contract for remuneration, the amount of remuneration and the conditions under which it will become payable must be ascertained by reference to the terms of that contract; no terms may be implied which would be inconsistent with such express agreement<sup>2</sup>. If money has been advanced against commission but the commission falls short of the advance, the difference must be repaid<sup>3</sup>.

In the absence of an express contract on the subject, a contract to pay reasonable remuneration may be implied from the circumstances of the case<sup>4</sup>. In awarding such remuneration the court may have regard to previous negotiations between the parties<sup>5</sup> or trade custom<sup>6</sup>; but, where the commission is left to the discretion of the principal, the court cannot determine either the basis or the rate of commission and therefore in the absence of payment by the principal, no commission will be recoverable<sup>7</sup>.

In the case of a commercial agent<sup>8</sup>, in the absence of agreement as to remuneration between the parties, the agent is entitled to the remuneration that commercial agents appointed for the goods forming the subject of his agency contract are customarily allowed in the place where he carried on his activities and, if there is no such customary practice, to reasonable remuneration taking into account all the aspects of the transaction<sup>9</sup>.

The mere fact of employment of a professional agent itself raises the presumption of a contract to remunerate him<sup>10</sup>, the amount of the remuneration and the conditions of its payment being ascertainable from the usages of his profession<sup>11</sup>. He is not, however, entitled to any further or other remuneration than the usages of the profession justify, unless he does work not strictly ancillary to the agency, in which case, as in the case of a non-professional agent, the implied contract is to pay reasonable remuneration, having regard to the circumstances of the particular case<sup>12</sup>. Thus, where an estate agent is employed to sell property subject to a mortgage, the agent's commission is calculated not only on the value of the equity of redemption but also on the amount of the mortgage, as the agent is employed to find someone who will take over the equity of redemption and indemnify his principal in respect of his liabilities under the mortgage<sup>13</sup>.

1 *Reeve v Reeve* (1858) 1 F & F 280; *Roberts v Smith* (1859) 4 H & N 315; and cf *Taylor v Brewer* (1813) 1 M & S 290 with *Bryant v Flight* (1839) 5 M & W 114. No barrister can make a binding contract for remuneration in respect of professional services: see *Kennedy v Broun* (1863) 13 CBNS 677; and see, generally, *Rondel v Worsley* [1969] 1 AC 191, [1967] 3 All ER 993, HL.

2 *Barnett v Isaacson* (1888) 4 TLR 645; *Green v Mules* (1861) 30 LJCP 343; *Alder v Boyle* (1847) 4 CB 635; *Lott v Outhwaite* (1893) 10 TLR 76, CA; *Broad v Thomas* (1830) 7 Bing 99; *Read v Rann* (1830) 10 B & C 438; *Howard, Houlder & Partners Ltd v Manx Isles Steamship Co Ltd* [1923] 1 KB 110; *Harley & Co v Nagata* (1917) 34 TLR 124; *Moor Line Ltd v Louis Dreyfus & Co* [1918] 1 KB 89, CA; *Burrough's Adding Machine Ltd v Aspinall* (1925) 41 TLR 276, CA; *Jones v Lowe* [1945] KB 73, [1945] 1 All ER 194. The contract may, however, be interpreted by reference to usages which are not inconsistent with it: see PARA 44.

3 *Rivoli Hats Ltd v Gooch* [1953] 2 All ER 823, [1953] 1 WLR 1190; cf *Clayton Newbury Ltd v Findlay* [1953] 2 All ER 826n [1953] 1 WLR 1195n.

4 *Bryant v Flight* (1839) 5 M & W 114. See also the Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 6; and the text and notes 8, 9.

5 *Way v Latilla* [1937] 3 All ER 759, HL, applying *Scarbrick v Parkinson* (1869) 20 LT 175.

6 *Bower v Jones* (1831) 8 Bing 65.

7 *Kofi Sunkersette Obu v A Strauss & Co Ltd* [1951] AC 243, PC. This does not apply where there is a binding promise to pay a reasonable sum: *Powell v Braun* [1954] 1 All ER 484, [1954] 1 WLR 401, CA. See also *Re Wolfe, Heller v Wolfe* [1952] 2 All ER 545 (assessment by court of fees for auctioneers acting in sale by court where no scale fees applicable). Scales of charges laid down by professional bodies if not expressly or impliedly incorporated into the contract may indicate what a reasonable sum would be. In *Withey Robinson (a firm) v Edwards* [1986] 1 EGLR 32, CA, a firm of surveyors was held to be entitled to remuneration on a quantum meruit basis even though it had sought initially to apply the scale fees of the relevant professional body.

8 le a commercial agent to whom the Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, apply: see PARA 72. As to the meaning of 'commercial agent' for these purposes see PARA 72. As to the form and amount of remuneration see regs 7-12; and PARA 105 et seq.

9 Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 6(1). This is without prejudice to the application of any enactment or rule of law concerning the level of remuneration: reg 6(2).

10 *Miller v Beal* (1879) 27 WR 403; *Manson v Baillie* (1855) 2 Macq 80, HL; *Turner v Reeve* (1901) 17 TLR 592. Cf *Corbin v Stewart* (1911) 28 TLR 99 (where the general rule was displaced).

11 *Broad v Thomas* (1830) 7 Bing 99; *Read v Rann* (1830) 10 B & C 438; *Moor Line v Louis Dreyfus & Co* [1918] 1 KB 89, CA; *Harley & Co v Nagata* (1917) 34 TLR 124; and see the cases cited in note 10.

12 *Williamson v Hine Bros* [1891] 1 Ch 390; *Marshall v Parsons* (1841) 9 C & P 656.

13 See *Way and Walker Ltd v Ryde* [1944] 1 All ER 9, CA.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/5. RELATIONS BETWEEN PRINCIPAL AND AGENT/(3) RIGHTS OF AGENT AGAINST PRINCIPAL/(ii) Remuneration/102. Remuneration must be earned.

## 102. Remuneration must be earned.

The following rules, derived from common law, must be read as being subject to legislative provision relating to commercial agents<sup>1</sup>, where such provision applies<sup>2</sup>.

In order to entitle the agent to receive his remuneration, he must have carried out that which he bargained to do<sup>3</sup>, and all conditions imposed by the contract must have been fulfilled<sup>4</sup>, unless the principal by his conduct estops himself from relying on them<sup>5</sup>. He is not, however, deprived of his right to remuneration, where he has done all he undertook to do<sup>6</sup>, by the fact that the transaction is not beneficial to the principal<sup>7</sup>, or that it has subsequently fallen through<sup>8</sup>, whether by some act<sup>9</sup> or default<sup>10</sup> of the principal, or otherwise<sup>11</sup>, unless there is a provision of the contract, express<sup>12</sup> or implied<sup>13</sup>, to that effect, or unless the agent was himself the cause of his services being abortive<sup>14</sup>; nor does he necessarily lose his right to remuneration through making a bona fide mistake even if it amounts to a breach of duty entitling the principal to compensation against him<sup>15</sup>.

An agent employed to achieve a particular purpose will not be entitled to commission unless he is the effective cause of the purpose being achieved<sup>16</sup>. An agent employed to sell property on commission who fails to do so but agrees to buy from his principal, does not earn his commission in the absence of express agreement<sup>17</sup>. To be an effective cause the agent need not necessarily complete or take part in the negotiations<sup>18</sup>. An agent who is to be remunerated by a commission on the price paid by the purchaser does not lose his right to remuneration if the vendor varies the contract by selling at a price lower than the lowest price stated to the agent<sup>19</sup>. Where, however, an agent is to be paid a commission upon a sum obtained or paid or earned for the principal, the agent is not entitled to remuneration until the principal has received the money<sup>20</sup>. Similarly, an agent cannot recover as upon quantum meruit for work or labour when he has failed to comply with the terms imposed upon him<sup>21</sup>.

- 1 le the Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053. As to the meaning of 'commercial agent' for these purposes see PARA 72.
- 2 As to where the Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, apply see PARA 72.
- 3 *Bull v Price* (1831) 7 Bing 237; *Martin v Perry and Daw* [1931] 2 KB 310 (commission payable 'on sale being effected'). Auctioneers may be entitled to their commission on an abortive sale; see *Skinner v Andrews and Hall* (1910) 26 TLR 340, CA, not following *Peacock v Freeman* (1888) 4 TLR 541, CA; cf *John Meacock & Co v Abrahams* [1956] 3 All ER 660, [1956] 1 WLR 1463, CA; and the cases cited in notes 17, 20. The original bargain may of course be varied: see *Harrods Ltd v Geneen* [1938] 4 All ER 493, CA (where agent instructed to find tenant to pay rent in advance, and principal accepted, initially, tenant to pay in arrear, agent still entitled to commission after principal later rejected tenant). See also *Bell Houses Ltd v City Wall Properties Ltd* (1967) 205 Estates Gazette 535, CA (no stage reached in negotiations for loan at which procuration fee payable under terms of agreement and no sufficient evidence of variation of terms of agreement).
- 4 *Chapman v Winson* (1904) 91 LT 17, CA; *Kirk v Evans* (1889) 6 TLR 9 (conditions imposed by usage of trade). See also the cases cited in notes 20, 21.
- 5 *Norwegian American Cruises A/S v Paul Mundy, The Vistafjord* [1988] 2 Lloyd's Rep 343, CA.
- 6 *Skinner v Andrews and Hall* (1910) 26 TLR 340, CA; *Price, Davies & Co v Smith* (1929) 141 LT 490, CA; cf *Howard, Houlder & Partners Ltd v Manx Isles Steamship Co Ltd* [1923] 1 KB 110.
- 7 *Green v Lucas* (1875) 33 LT 584, CA; *Moir v Marten* (1891) 7 TLR 330.
- 8 *Fuller v Eames* (1892) 8 TLR 278; *Harris v Petherick* (1878) 39 LT 543.
- 9 *Horford v Wilson* (1807) 1 Taunt 12; *Platt v Depree* (1893) 9 TLR 194; *Passingham v King* (1898) 14 TLR 392, CA.
- 10 *Fisher v Drewett* (1878) 48 LJQB 32, CA; *Roberts v Barnard* (1884) Cab & El 336; *Lockwood v Levick* (1860) 8 CBNS 603; *Vulcan Car Agency v Fiat Motors Ltd* (1915) 32 TLR 73. See also *Blake & Co v Sohn* [1969] 3 All ER 123, [1969] 1 WLR 1412 (default means wilful refusal or deceit and not mere inability to complete).
- 11 *Fuller v Eames* (1892) 8 TLR 278; cf *Re Sovereign Life Assurance Co, Salter's Claim* (1891) 7 TLR 602.
- 12 *Alder v Boyle* (1847) 4 CB 635; *Bull v Price* (1831) 7 Bing 237; *Clack v Wood* (1882) 9 QBD 276, CA; and cf *Lara v Hill* (1863) 15 CBNS 45.
- 13 *Read v Rann* (1830) 10 B & C 438; *Berthoud v Schweder & Co* (1915) 31 TLR 404.
- 14 *Dalton v Irwin* (1830) 4 C & P 289; *Hill v Featherstonhaugh* (1831) 7 Bing 569.
- 15 *Keppel v Wheeler* [1927] 1 KB 577, CA; *Harrods Ltd v Lemon* [1931] 2 KB 157, CA.
- 16 *Wilkinson v Martin* (1837) 8 C & P 1; *Gillow & Co v Lord Aberdare* (1892) 9 TLR 12; *Chamberlain and Willows v HBS (Trust) Ltd* (1962) 184 Estates Gazette 849, CA. See further PARA 104.
- 17 *Hocker v Waller* (1924) 29 Com Cas 296. A sole agency for sale does not prohibit the principal from selling directly, and if the principal does so sell the agent will not be entitled to damages for lost commission: *Sadler v Whittaker* (1953) 162 Estates Gazette 404, CA; cf *Snelgrove v Ellringham Colliery Co* (1881) 45 JP 408. As to estate agents' commission see generally PARA 103.
- 18 *Thompson, Rippon & Co v Thomas* (1895) 11 TLR 304, CA.
- 19 *Price, Davies & Co v Smith* (1929) 141 LT 490, CA; and see *Allan v Leo Lines Ltd* [1957] 1 Lloyd's Rep 127.
- 20 *Bull v Price* (1831) 7 Bing 237; *White v Turnbull, Martin & Co* (1898) 3 Com Cas 183, CA; *Foster's Agency Ltd v Romaine* [1916] WN 231, CA; *L French & Co Ltd v Leeston Shipping Co Ltd* [1922] 1 AC 451, HL; *Knight, Frank and Rutley v Gordon* (1923) 39 TLR 399; *Howard, Houlder & Partners Ltd v Manx Isles Steamship Co Ltd* [1923] 1 KB 110; *Price, Davies & Co v Smith* (1929) 141 LT 490, CA; but cf *Vulcan Car Agency v Fiat Motors Ltd* (1915) 32 TLR 73.
- 21 *Martin v Tucker* (1885) 1 TLR 655; *Barnett v Isaacson* (1888) 4 TLR 645; *Lott v Outhwaite* (1893) 10 TLR 76, CA; *Howard, Houlder & Partners Ltd v Manx Isles Steamship Co Ltd* [1923] 1 KB 110; *Bartlett v Farmer and Jelley* (1965) 194 Estates Gazette 279.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/5. RELATIONS BETWEEN PRINCIPAL AND AGENT/(3) RIGHTS OF AGENT AGAINST PRINCIPAL/(ii) Remuneration/103. Estate agent's commission.

### **103. Estate agent's commission.**

A contract by which an owner of property puts it into the hands of an agent for letting or sale amounts to a promise binding upon the principal to pay a sum of money upon the happening of a specified event through the instrumentality of the agent<sup>1</sup>. It is not a contract of employment in the ordinary meaning of those words for, except where he is appointed as sole agent<sup>2</sup>, the agent is under no obligation to do anything, and consequently no term can be implied in such a contract that the principal will not so act as to prevent the agent from earning his commission, as by disposing of the property himself or through another agent or by breaking off negotiations before the happening of the specified event<sup>3</sup>. Once, however, an agent undertakes work and enters upon it, he has a duty to take reasonable care in connection with it<sup>4</sup>. What the event is, on the happening of which the money is payable, must depend upon the construction of the contract<sup>5</sup> and the clarity with which the event is defined by the contract<sup>6</sup> and there are no special rules of construction applicable to estate agency contracts. Normally, when that event is the finding of a purchaser, no claim for commission can arise until the purchase price has been received or would have been received but for the default of the principal<sup>7</sup>. Commission is payable upon completion of a sale to a purchaser introduced by the agent notwithstanding the fact that instructions were withdrawn beforehand<sup>8</sup>. If the principal enters into a binding contract<sup>9</sup> with the purchaser, and the latter is able and willing to complete, a fact which the agent must establish<sup>10</sup>, and the principal refuses to complete, the commission is payable<sup>11</sup>. If, however, the sale is not completed owing to the default of the purchaser, no commission is payable<sup>12</sup>, even though the deposit has been paid and forfeited<sup>13</sup>, for the principal is not bound to bring a claim against the defaulting purchaser<sup>14</sup>. No commission is payable where estate agents offer the property at a sum below the price agreed with the vendor<sup>15</sup>. In the event of the principal succeeding on a claim for specific performance or damages, commission will be payable<sup>16</sup>.

If the agent desires to bind the principal to pay commission, not only on sale but on the introduction of a person who makes an offer to purchase, as contrasted with one who actually buys, he must use clear and unequivocal language to that effect<sup>17</sup>. In those cases the offer must be a firm offer, which by acceptance will give rise to a contractual relationship<sup>18</sup>. An offer made subject to contract<sup>19</sup>, or subject to a condition of whose fulfilment the offeror is the sole arbiter<sup>20</sup>, or subject to some uncertain event<sup>21</sup>, will not suffice. In this case also the offeror must be ready, able and willing to complete<sup>22</sup>, and if before acceptance of the offer he withdraws, no commission is payable. If the principal withdraws his instructions at a time when the agent has found a person who is able and willing, and such ability and willingness are unequivocally clear, commission may be payable<sup>23</sup>. An agent cannot, however, secure such commission by registration of a charge on the deposit and purchase money as a land charge, for his right relates only to the money<sup>24</sup>.

1 *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108, [1941] 1 All ER 33, HL.

2 Where the appointment is as a sole agent, the agent is under an implied obligation to use his best endeavours to sell the property, and this is sufficient consideration to support the contract, and the agent would be in breach of his contract if he did not do something, although he might not be successful; see *E Christopher & Co v Essig* [1948] WN 461; *Mendoza & Co v Bell* (1952) 159 Estates Gazette 372.

3 *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108, [1941] 1 All ER 33, HL, approving the dissenting judgment of Scrutton LJ in *George Trollope & Sons v Martyn Bros* [1934] 2 KB 436, CA, and overruling *George Trollope &*

*Sons v Caplan* [1936] 2 KB 382, [1936] 2 All ER 842, CA. See also *Sadler v Whittaker* (1953) 162 Estates Gazette 404, CA ('sole agency' agreement construed contra proferentem); and PARA 108 note 9.

4 *PG Prebble & Co v West* (1969) 113 Sol Jo 657, CA (duty to communicate a reasonable offer to the client); *John D Wood & Co (Residential & Agricultural Land) Ltd v Knatchbull* [2002] EWHC 2822 (QB), [2003] 1 EGLR 33, [2002] All ER (D) 232 (Dec) (duty to communicate to client vendor information as to selling price of neighbouring property).

5 *James v Smith* (1921) [1931] 2 KB 317n, CA; *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108, [1941] 1 All ER 33, HL; *Chamberlain and Willows v HBS (Trust) Ltd* (1962) 184 Estates Gazette 849, CA; *FP Rolfe & Co v George* (1969) 210 Estates Gazette 455, CA (agent called in to negotiate entitled to commission). See also *McCulloch Co of Canada v Lloyd G Howe Industrial Real Estate Ltd* [1960] OWN 224, 24 DLR (2d) 57, Ont HC (commission payable 'on transaction'; transaction held to mean mutually enforceable agreement, so no commission payable by purchaser where agreement binding on vendor only); *Christie, Owen and Davies Ltd v Rapacioli* [1974] QB 781, [1974] 2 All ER 311, CA; *Harwood (t/a RSBS Group) v Smith* [1998] 1 EGLR 5, [1998] 11 EG 178, CA (whether transaction arranged by the seller fell within the parameters of the sole selling agreement which had been terminated by the seller) (doubted in *G and S Properties v Francis* 2001 SLT 934, Ct of Sess).

6 *Midgley Estates Ltd v Hand* [1952] 2 QB 432, [1952] 1 All ER 1394, CA; *Sheggia v Gradwell* [1963] 3 All ER 114, [1963] 1 WLR 1049, CA; *Foxtons Ltd v Thesleff* [2005] EWCA Civ 514, [2005] 2 EGLR 29.

7 *Jones v Lowe* [1945] KB 73, [1945] 1 All ER 194; *Fowler v Bratt* [1950] 2 KB 96, [1950] 1 All ER 662, CA; *McCallum v Hicks* [1950] 2 KB 271, [1950] 1 All ER 864, CA; *Dennis Reed Ltd v Goody* [1950] 2 KB 277, [1950] 1 All ER 919, CA; *Jaques v Lloyd D George & Partners Ltd* [1968] 2 All ER 187, [1968] 1 WLR 625, CA; *Blake & Co v Sohn* [1969] 3 All ER 123, [1969] 1 WLR 1412 (commission is normally payable from the purchase price so in the absence of agreement or default a sale is a condition precedent to payment); cf *Brodie Marshall & Co (Hotel Division) Ltd v Sharer* [1988] 1 EGLR 21 (example of such an agreement); *Marcan Shipping (London) v Polish Steamship Co, The Manifest Lipkowsky* [1988] 2 Lloyd's Rep 171; *WA Ellis Services Ltd v Wood* [1993] 2 EGLR 24, [1993] 31 EG 78 (no implied term that commission payable directly out of proceeds of sale held by vendor's solicitors); *Connell Estate Agents (a firm) v Begej* [1993] 2 EGLR 35, [1993] 39 EG 123, CA (property sold partly for cash and partly in part exchange for another property; commission payable on total value of property sold).

8 *Robinson Scammell & Co v Ansell* [1985] 2 EGLR 41, CA (instructions withdrawn because agent, acting in good faith, failed to consult principals before communicating with purchasers). Where two agents send particulars to the eventual purchaser, the effective cause of the sale is the agent who had succeeded in awakening the purchaser's interest at the opportune moment: *Bentleys Estate Agents Ltd v Granix Ltd* [1989] 2 EGLR 21. See also *Chesterfield & Co Ltd v Zahid* [1989] 2 EGLR 24; and *Brodie Marshall & Co (Hotel Division) Ltd v Sharer* [1988] 1 EGLR 21. See, further, *Peter Yates & Co v Bullock* [1990] 2 EGLR 24, [1990] 37 EG 75, CA (property sold through second agent to purchaser introduced by first agent); *Day Morris Associates v Voyce* [2003] EWCA Civ 189, [2003] All ER (D) 368 (Feb) (property sold directly by husband, after divorce proceedings, to purchaser previously introduced by estate agent in dealings with wife; commission payable); *Fleurets Ltd v Dashwood* [2007] EWHC 1610 (QB), [2007] 28 EG 120 (property sold through second agency following withdrawal of instructions).

9 A contract unenforceable for lack of appropriate formalities is not a binding contract (*Bavin v Bunney* [1950] WN 181), nor is a contract which the intending purchaser is entitled to rescind on the grounds of innocent misrepresentation (*Gregory v Fearn* [1953] 2 All ER 559, [1953] 1 WLR 974, CA; *Peter Long & Partners v Burns* [1956] 3 All ER 207, [1956] 1 WLR 1083, CA). Commission may, however, be payable even though the contract is not specifically enforceable, if a claim for damages will lie: *Sheggia v Gradwell* [1963] 3 All ER 114, [1963] 1 WLR 1049, CA.

10 *Martin v Perry and Daw* [1931] 2 KB 310; *James v Smith* (1921) [1931] 2 KB 317n, CA; *Dennis Reed Ltd v Nicholls* [1948] 2 All ER 914.

11 *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108, [1941] 1 All ER 33, HL; *Fowler v Bratt* [1950] 2 KB 96, [1950] 1 All ER 662; *Dennis Reed Ltd v Goody* [1950] 2 KB 277, [1950] 1 All ER 919, CA; *John E Trinder & Partners v Haggis* [1951] WN 416, CA.

12 *Martin v Perry and Daw* [1931] 2 KB 310; *James v Smith* (1921) [1931] 2 KB 317n, CA; *Musson v Moxley* [1936] 1 All ER 64; *Poole v Clarke & Co* [1945] 2 All ER 445.

13 *Boots v E Christopher & Co* [1952] 1 KB 89, [1951] 2 All ER 1045, CA.

14 *Dennis Reed Ltd v Goody* [1950] 2 KB 277, [1950] 1 All ER 919, CA; *Boots v E Christopher & Co* [1952] 1 KB 89, [1951] 2 All ER 1045, CA.

15 *Spiers v Taylor* (1984) 271 Estates Gazette 196, CA.



16 *Boots v E Christopher & Co* [1952] 1 KB 89, [1951] 2 All ER 1045, CA. Where, however, the agent is also in breach, for example by failure to take a deposit from the prospective purchaser, he will not be entitled to commission: see *Columbus v Williamson & Co Ltd* [1969] NZLR 708, NZ CA.

17 *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108, [1941] 1 All ER 33, HL; *Jones v Lowe* [1945] KB 73, [1945] 1 All ER 194; *Dennis Reed Ltd v Goody* [1950] 2 KB 277, [1950] 1 All ER 919, CA. For cases where it was held that this was the effect of the contract see *Giddys v Horsfall* [1947] 1 All ER 460; *Dennis Reed Ltd v Nicholls* [1948] 2 All ER 914; *Bennett & Partners v Millett* [1949] 1 KB 362, [1948] 2 All ER 929. In *EP Nelson & Co v Rolfe* [1950] 1 KB 139, [1949] 2 All ER 584, CA, it was assumed that this was the effect of the contract; see the explanation in *Graham and Scott (Southgate) Ltd v Oxlade* [1950] 2 KB 257, [1950] 1 All ER 856, CA; *Dennis Reed Ltd v Goody*; and *Midgley Estates Ltd v Hand* [1952] 2 QB 432, [1952] 1 All ER 1394, CA. See also *Ackroyd & Sons v Hasan* [1960] 2 QB 144, [1960] 2 All ER 254, CA; *Lucas & Sons v Mayne* (1954) 164 Estates Gazette 441; *Drewery v Ware-Lane* [1960] 3 All ER 529, [1960] 1 WLR 1204, CA; *Foxtons Ltd v Thesleff* [2005] EWCA Civ 514, [2005] 2 EGLR 29. Cf *Sheggia v Gradwell* [1963] 3 All ER 114, [1963] 1 WLR 1049, CA; *Bartlett v Farmer and Jelley* (1965) 194 Estates Gazette 279. See also *Jaques v Lloyd D George & Partners Ltd* [1968] 2 All ER 187, [1968] 1 WLR 625, CA, where the meaning of a clause relating to commission was misrepresented to the principal and was so uncertain that it was held unenforceable. See also *Lordsgate Properties Ltd v Balcombe* [1985] 1 EGLR 20 (vendor held liable for commission to two different agents on different bases).

18 *Bennett, Walden & Co v Wood* [1950] 2 All ER 134, CA. See also *Ackroyd & Sons v Hasan* [1960] 2 QB 144, [1960] 2 All ER 254, CA; *Bartlett v Farmer and Jelley* (1965) 194 Estates Gazette 279. It is not necessary, however, for the vendor to bring a claim for specific performance for the agent to be entitled to commission: *Boots v E Christopher & Co* [1952] 1 KB 89, [1951] 2 All ER 1045, CA.

19 See *Graham and Scott (Southgate) Ltd v Oxlade* [1950] 2 KB 257, [1950] 1 All ER 856, CA; *Dennis Reed Ltd v Goody* [1950] 2 KB 277, [1950] 1 All ER 919, CA; *Christie, Owen and Davies Ltd v Stockton* [1953] 2 All ER 1149, [1953] 1 WLR 1353. Cf *Ackroyd & Sons v Hasan* [1960] 2 QB 144, [1960] 2 All ER 254, CA (offer originally made subject to contract had become unconditional, but no commission allowed because vendor did not accept offer). See also *George A Woodman & Sons v Linden* [1957] 1 All ER 365n, (1956) 167 Estates Gazette 384, CA; *Martin Gale and Wright v Buswell* (1961) 105 Sol Jo 466, CA; *Beresford (St James) Ltd v Howard (Kensington) Ltd* (1965) 193 Estates Gazette 439.

20 *Graham and Scott (Southgate) Ltd v Oxlade* [1950] 2 KB 257, [1950] 1 All ER 856, CA (subject to a satisfactory survey).

21 *Murdoch Lownie Ltd v Newman* [1949] 2 All ER 783 (subject to mortgage being obtained).

22 *Dennis Reed Ltd v Goody* [1950] 2 KB 277, [1950] 1 All ER 919, CA. Ability to complete is not confined to financial ability: *Dellaflora v Lester* [1962] 3 All ER 393, [1962] 1 WLR 1208, CA (where after contract the landlord's consent to assignment was refused). Whether a purchaser is willing and able is a question of fact: *AL Atkinson Ltd v O'Neil and Bland & Co (Investments) Ltd* (1961) 105 Sol Jo 1067, CA. See also *AL Wilkinson Ltd v Brown* [1966] 1 All ER 509, [1966] 1 WLR 194, CA (offer conditional on purchaser selling own house); cf *Sheggia v Gradwell* [1963] 3 All ER 114, [1963] 1 WLR 1049, CA; *Martin Gale and Wright v Buswell* (1961) 105 Sol Jo 466, CA.

23 *EP Nelson & Co v Rolfe* [1950] 1 KB 139, [1949] 2 All ER 584, CA; *John E Trinder & Partners v Haggis* [1951] WN 416, CA. This does not apply where the commission is only payable on the acceptance of an offer by a willing and able purchaser: see *Christie, Owen and Davies Ltd v Stockton* [1953] 2 All ER 1149, [1953] 1 WLR 1353; *Christie, Owen and Davies Ltd v Rapacioli* [1974] QB 781, [1974] 2 All ER 311, CA (commission payable on introduction of person ready, able and willing to purchase at acceptable price; price agreed but vendor withdrew before contract; vendor liable).

24 *Georgiades v Edward Wolfe & Co Ltd* [1965] Ch 487, [1964] 3 All ER 433, CA.

## UPDATE

### 103 Estate agent's commission

NOTE 8--See *Foxtons Ltd v Pelkey Bicknell* [2008] EWCA Civ 419, [2008] All ER (D) 328 (Apr) (first agent introduced purchaser to property but second agent effective cause of sale).

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/5. RELATIONS BETWEEN PRINCIPAL AND AGENT/(3) RIGHTS OF AGENT AGAINST PRINCIPAL/(ii) Remuneration/104. Transactions in respect of which remuneration may be claimed.

#### **104. Transactions in respect of which remuneration may be claimed.**

The following rules, derived from common law, must be read as being subject to legislative provision relating to commercial agents<sup>1</sup>, where such provision applies<sup>2</sup>.

Remuneration can be claimed only on transactions which are the direct consequence of the agency<sup>3</sup>. It is not necessary that the agent should actually complete the transaction<sup>4</sup>, but he must show that it was brought about as the direct result of his intervention<sup>5</sup>. It is not sufficient to show that it would not have been entered into but for his services, if it resulted from them only as a casual or remote consequence<sup>6</sup>. It follows therefore that, where several agents are concerned in negotiating a transaction between the principal and a particular third party, the agent entitled to remuneration is not necessarily the agent who first introduces the business to him, but the agent who is the effective cause of the transaction being completed<sup>7</sup>. An agent who introduces a property to a prospective lessee who then negotiates the lease through the lessor's agent may claim commission in respect of the work he has done on a quantum meruit basis<sup>8</sup>.

The rule that an agent is entitled to remuneration when his intervention was the effective cause in bringing about the transaction between the principal and the third party is exemplified in cases where an agent has been held entitled to a commission upon sale to a purchaser introduced by him, or through him by other agents<sup>9</sup>, although the sale was effected directly between the principal and the third party<sup>10</sup>, at a lower price than the minimum stated to the agent<sup>11</sup>, or on terms which the agent had advised the principal not to accept<sup>12</sup>. The rule that the agent must be the effective cause can be negated by the express words of the contract<sup>13</sup>.

If the agent is only an agent to let, a subsequent sale to the tenant does not entitle the agent to a commission<sup>14</sup>; but it is otherwise if an agent, instructed to sell or let, has let with an option to purchase and the option is exercised<sup>15</sup>.

1 The Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053. As to the meaning of 'commercial agent' for these purposes see PARA 72.

2 See PARA 105. As to where the Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, apply see PARA 72.

3 *Tribe v Taylor* (1876) 1 CPD 505; *Gibson v Crick* (1862) 1 H & C 142; *Toulmin v Millar* (1887) 12 App Cas 746, HL; *Curtis v Nixon* (1871) 24 LT 706; *Thompson v British Berna Motor Lorries Ltd* (1917) 33 TLR 187; *Coles v Enoch* [1939] 3 All ER 327, CA. The Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, do not appear to affect the rule stated in the text, but provide that an agent is entitled to commission on transactions concluded both during and following the termination of the agency contract, and also provide for the time at which payment is due and the extinction of the right to commission: see regs 7-11; and PARA 105.

4 *Mansell v Clements* (1874) LR 9 CP 139; *Green v Bartlett* (1863) 14 CBNS 681; *Walker, Fraser and Steele v Fraser's Trustees* 1909 2 SLT 453; *Burchell v Gowrie and Blockhouse Collieries Ltd* [1910] AC 614, PC; *Bow's Emporium Ltd v AR Brett & Co Ltd* (1927) 44 TLR 194, HL. See also *Allen v Anderson* [1969] NZLR 951, NZ CA, where an agent, employed to sell a business owned by a company, which sale was ultimately effected by a sale of shares in the company, was held nevertheless entitled to his commission, although he was not a sharebroker and so did not complete the transaction.

5 *Wilkinson v Martin* (1837) 8 C & P 1; *Burton v Hughes* (1885) 1 TLR 207; *Howard, Houlder & Partners Ltd v Manx Isles Steamship Co Ltd* [1923] 1 KB 110; *Thompson, Rippon & Co v Thomas* (1895) 11 TLR 304, CA; *Jack Windle Ltd v Brierly* [1952] 1 All ER 398; *Stewarts and Lloyds Ltd v Zoes* (1955) Times, 5 July, HL; and see the cases in note 4.

6 *Tribe v Taylor* (1876) 1 CPD 505; *Lumley v Nicholson* (1886) 34 WR 716; *Antrobus v Wickens* (1865) 4 F & F 291; *Millar, Son & Co v Radford* (1903) 19 TLR 575, CA; *County Homeseach Co (Thames & Chilterns) Ltd v*

*Cowham* [2008] EWCA Civ 26, [2008] NPC 10, [2008] All ER (D) 281 (Jan). See also *Nightingale v Parsons* [1914] 2 KB 621, CA.

7 *Taplin v Barrett* (1889) 6 TLR 30; *Barnett v Brown & Co* (1890) 6 TLR 463; *Millar, Son & Co v Radford* (1903) 19 TLR 575, CA; *Bartlett v Cole* (1963) 188 Estates Gazette 397, CA; *Allan v Leo Lines Ltd* [1957] 1 Lloyd's Rep 127; *Robinson v Tuck* (1957) 107 Ljo 683 (County Court); *John D Wood & Co v Dantata* [1987] 2 EGLR 23, CA; *Bentleys Estate Agents Ltd v Granix Ltd* [1989] 2 EGLR 21; *Chesterfield & Co Ltd v Zahid* [1989] 2 EGLR 24; *Peter Yates & Co v Bullock* [1990] 2 EGLR 24, [1990] 37 EG 75, CA; *Chasen Ryder & Co v Hedges* [1993] 1 EGLR 47, [1993] 08 EG 119, CA; *Harding Maughan Hambly Ltd v Cie Européenne de Courtage d'Assurances et de Réassurances SA* [2000] 1 All ER (Comm) 225; *County Homeseach Co (Thames & Chilterns) Ltd v Cowham* [2008] EWCA Civ 26, [2008] NPC 10, [2008] All ER (D) 281 (Jan). See further PARA 103. The principal cannot interplead if several agents claim commission upon the same transaction: *Greatorex & Co v Shackle* [1895] 2 QB 249.

8 *Sinclair Goldsmith v Minero Pinero Commercial* (1978) 248 Estates Gazette 1015. See also *Lordsgate Properties Ltd v Balcombe* [1985] 1 EGLR 20.

9 *Price, Davies & Co v Smith* (1929) 141 LT 490, CA; *Nahum v Royal Holloway and Bedford New College* [1999] EMLR 252, CA (introduction by art dealer of a purchaser to the seller principal via the seller's agent was the effective cause of sale).

10 *Burchell v Gowrie and Blockhouse Collieries Ltd* [1910] AC 614, PC; contrast *Davis v George Trollope & Sons* [1943] 1 All ER 501, CA.

11 *Price, Davies & Co v Smith* (1929) 141 LT 490, CA; cf *Howard, Houlder & Partners Ltd v Manx Isles Steamship Co Ltd* [1923] 1 KB 110.

12 *Burchell v Gowrie and Blockhouse Collieries Ltd* [1910] AC 614, PC.

13 *Brian Cooper & Co v Fairview Estates (Investments) Ltd* [1987] 1 EGLR 18, CA.

14 *Nightingale v Parsons* [1914] 2 KB 621, CA.

15 *Cox & Son v Starley* (1913) 48 Ljo 705.

## UPDATE

### 104 Transactions in respect of which remuneration may be claimed

NOTES 6, 7--*Cowham*, cited, reported at [2008] 1 WLR 909.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/5. RELATIONS BETWEEN PRINCIPAL AND AGENT/(3) RIGHTS OF AGENT AGAINST PRINCIPAL/(ii) Remuneration/105. Remuneration of commercial agents.

### 105. Remuneration of commercial agents.

A commercial agent<sup>1</sup> who is remunerated wholly or partly by commission<sup>2</sup> is entitled to commission on commercial transactions concluded during the period covered by the agency contract where:

- 30 (1) the transaction has been concluded as a result of his action<sup>3</sup>;
- 31 (2) the transaction is concluded with a third party whom he has previously acquired as a customer for transactions of the same kind<sup>4</sup>; or
- 32 (3) he has an exclusive right to a specific geographical area or to a specific group of customers and the transaction has been entered into with a customer belonging to that area or group<sup>5</sup>;

and the commission must be paid not later than on the last day of the month following the quarter<sup>6</sup> in which it became due<sup>7</sup>. The right to commission can be extinguished only if and to the extent that it is established that the contract between the third party and the principal will not be executed due to a reason for which the principal is not to blame<sup>8</sup>. A commercial agent is not entitled to commission as described above if that commission is payable to a previous commercial agent of the principal<sup>9</sup>, unless it is equitable because of the circumstances for the commission to be shared between the commercial agents<sup>10</sup>.

Any agreement to derogate from these provisions to the detriment of the commercial agent is void<sup>11</sup>.

1     Ie a commercial agent to whom the Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, apply. As to the meaning of 'commercial agent', and as to the cases to which the regulations apply, see PARA 72.

2     Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 6(3). 'Commission' means any part of the remuneration of a commercial agent which varies with the number or value of business transactions: reg 2(1). A mark-up is not a 'commission' within this definition: see *Mercantile International Group plc v Chuan Soon Huat Industrial Group plc* [2001] 2 All ER (Comm) 632; on appeal [2002] EWCA Civ 288, [2002] 1 All ER (Comm) 788. These provisions (ie the Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, regs 7-12 (see the text and notes 3-11) do not apply where a commercial agent is not remunerated (wholly or in part) by commission: reg 6(3).

3     Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 7(1)(a).

4     Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 7(1)(b).

5     Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 7(2).

6     For these purposes, unless otherwise agreed between the parties, the first quarter period runs from the date the agency contract takes effect, and subsequent periods run from that date in the third month thereafter or the beginning of the fourth month, whichever is sooner: Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 10(3).

7     Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 10(3). Commission becomes due as soon as, and to the extent that, one of the following circumstances occurs:

11     (1) the principal has executed the transaction (reg 10(1)(a));

12     (2) the principal should, according to his agreement with the third party, have executed the transaction (reg 10(1)(b)); or

13     (3) the third party has executed the transaction (reg 10(1)(c)),

and becomes due at the latest when the third party has executed his part of the transaction or should have done so if the principal had executed his part of the transaction, as he should have (reg 10(2)).

8     Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 11(1). Any commission which the commercial agent has already received must be refunded if the right to it is extinguished: reg 11(2).

9     Ie payable to a commercial agent who is entitled to commission by virtue of the Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 8 (see PARA 107).

10    Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 9(1). The principal is liable for any sum due under reg 9(1) to the person entitled to it in accordance therewith, and any sum which the other commercial agent receives to which he is not entitled must be refunded to the principal: reg 9(2).

11    Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, regs 10(4), 11(3).

## UPDATE

### 105 Remuneration of commercial agents

NOTE 5--See Case C-19/07 *Chevassus-Marche v Groupe Danone* [2008] 2 All ER (Comm) 1093, ECJ (agent entrusted with specific geographical area not entitled, without any action on part of principal, to commission for transactions concluded by customers belonging to that area).

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/5. RELATIONS BETWEEN PRINCIPAL AND AGENT/(3) RIGHTS OF AGENT AGAINST PRINCIPAL/(ii) Remuneration/106. Transactions beyond scope of authority.

### **106. Transactions beyond scope of authority.**

An agent is not entitled to receive any remuneration in respect of a transaction resulting from the agency which differs substantially from that which he was employed to procure<sup>1</sup>, nor, generally, in respect of a transaction in which he is at the same time the remunerated agent of the other party<sup>2</sup>, or where he becomes himself the purchaser<sup>3</sup>.

1 *Toulmin v Millar* (1887) 12 App Cas 746, HL; *Barnett v Isaacson* (1888) 4 TLR 645; *Johnson v Kearley* [1908] 2 KB 514, CA; *Henderson and Boal v Martin* (1911) 46 ILT 13; *Blaker v Hawes and Brown* (1913) 109 LT 320; *Aston v Kelsey* [1913] 3 KB 314, CA; *Mote v Gould* (1935) 152 LT 347; *GT Hodges & Sons v Hackbridge Park Residential Hotel Ltd* [1940] 1 KB 404, [1939] 4 All ER 347, CA (compulsory acquisition at less than vendor's price).

2 *Fullwood v Hurley* [1928] 1 KB 498, CA; see also *Foster v Reaume* [1924] 2 DLR 951, Can SC.

3 *Hocker v Waller* (1924) 29 Com Cas 296.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/5. RELATIONS BETWEEN PRINCIPAL AND AGENT/(3) RIGHTS OF AGENT AGAINST PRINCIPAL/(ii) Remuneration/107. Transactions after termination of authority.

### **107. Transactions after termination of authority.**

At common law, as a rule, no remuneration is payable upon transactions between the principal and third persons introduced to him by the agent arising after the termination of the authority<sup>1</sup>, whether such transactions are due to the agent's introduction<sup>2</sup> or not<sup>3</sup>. Remuneration may, however, be payable in respect of such later transactions if they are in fact part of a transaction in which the agent was employed<sup>4</sup>, or if there was an express term in the contract to that effect, or a clear intention to continue such remuneration after determination of the agent's employment can be discovered from the construction of the contract of agency<sup>5</sup>. Such a construction may more readily be found where the agent is an independent contractor and not an employee<sup>6</sup>, and in these cases commission will be payable even though the agent was dismissed<sup>7</sup>, and may be so though he was not the effective cause of the transaction<sup>8</sup>.

At common law a commission agent, whose contract entitles him to commission on repeat orders, may, after termination of the agency, recover from the principal compensation based on the then existing value of the repeat orders likely to be received, adjusted in respect of expenses the agent would save and the principal would incur as a consequence of the termination; the agent is not, in general, entitled to a declaration or an account for the future in relation to such repeat orders<sup>9</sup>.

These rules are significantly modified in relation to commercial agents to whom certain statutory provisions apply<sup>10</sup>. Such a commercial agent is entitled to commission on commercial

transactions concluded after the agency contract has terminated if the transaction is mainly attributable to his efforts during the period covered by the agency contract and was entered into within a reasonable period after that contract terminated<sup>11</sup>. He is also so entitled where the order of the third party reached the principal or the commercial agent before the agency contract terminated<sup>12</sup> pursuant to a transaction which has been concluded as a result of his action<sup>13</sup> or concluded with a third party whom he has previously acquired as a customer for transactions of the same kind<sup>14</sup> or where he has an exclusive right to a specific geographical area or to a specific group of customers and the transaction was entered into with a customer belonging to that area or group<sup>15</sup>. A commercial agent is not entitled to commission<sup>16</sup> if that commission is payable to a previous commercial agent by virtue of the principle as described above<sup>17</sup>, unless it is equitable because of the circumstances for the commission to be shared between the commercial agents<sup>18</sup>.

1 *Tribe v Taylor* (1876) 1 CPD 505; *Ward v Spivak* [1957] IR 40. See also *Sales v Crispi* (1913) 29 TLR 491. As to temporary suspension of the agent's activities see *Nordman v Rayner and Sturges* (1916) 33 TLR 87.

2 *Barrett v Gilmour & Co* (1901) 6 Com Cas 72; *Hilton v Helliwell* [1894] 2 IR 94; *Nayler v Yearsley* (1860) 2 F & F 41; *Crocker Horlock Ltd v B Lang & Co Ltd* [1949] 1 All ER 526; *Jack Windle Ltd v Brierley* [1952] 1 All ER 398.

3 *Boyd v Tovil Paper Co Ltd* (1888) 4 TLR 332, CA.

4 *Wilkinson v Martin* (1837) 8 C & P 1. See also *Christie, Owen and Davies (t/a Christie & Co) v Jones* (1966) 198 Estates Gazette 1093, where estate agents were held entitled to their commission on sale to a purchaser, originally introduced by them, which took place after the agents ceased to act, as their introduction was, on the facts, the effective cause of the sale.

5 Such intention was discovered in *Bilbee v Hasse & Co* (1889) 5 TLR 677; *Salomon v Brownfield and Brownfield Guild Pottery Society Ltd* (1896) 12 TLR 239; *Faulkner v Cooper & Co Ltd* (1899) 4 Com Cas 213; *Wilson v Harper, Son & Co* [1908] 2 Ch 370; *British Bank for Foreign Trade Ltd v Novinex Ltd* [1949] 1 KB 623, [1949] 1 All ER 155, CA. However it was not so found in *Weare v Brimsdown Lead Co Ltd* (1910) 103 LT 429; *Bickley v Browning, Todd & Co* (1913) 30 TLR 134; *Marshall v Glanvill* [1917] 2 KB 87; *Cramb v Godwin* (1919) 35 TLR 477, CA; *Crocker Horlock Ltd v B Lang & Co Ltd* [1949] 1 All ER 526 (repeat orders). See also *Roberts v Elwells Engineers Ltd* [1972] 2 QB 586, [1972] 2 All ER 890, CA (entitlement by agreement, as supplemented by course of dealing, to commission on orders and repeat orders attributable to salesman's original introduction); *Marshall v NM Financial Management Ltd* [1995] 4 All ER 785, [1995] 1 WLR 1461 (affd [1997] 1 WLR 1527, [1997] ICR 1065, CA).

6 *Sellers v London Counties Newspapers* [1951] 1 KB 784, [1951] 1 All ER 544, CA.

7 *Salomon v Brownfield and Brownfield Guild Pottery Society Ltd* (1896) 12 TLR 239; *Bilbee v Hasse & Co* (1889) 5 TLR 677. See also *Levy v Goldhill & Co* [1917] 2 Ch 297; *Roberts v Elwells Engineers Ltd* [1972] 2 QB 586, [1972] 2 All ER 890, CA; and cf *Cramb v Godwin* (1919) 35 TLR 477, CA.

8 *Robey v Arnold* (1898) 14 TLR 220, CA; *Walker, Fraser and Steele v Fraser's Trustees* 1909 2 SLT 453; *Brandon v Hanna* [1907] 2 IR 212, CA.

9 *Roberts v Elwells Engineers Ltd* [1972] 2 QB 586, [1972] 2 All ER 890, CA.

10 Ie where the Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, apply. As to the meaning of 'commercial agent', and as to the cases to which those Regulations apply, see PARA 72. In addition to the provisions set out in the text and notes 11-18, regs 10 (when commission becomes due, and date for payment), 11 (extinction of right to commission), and 12 (information as to commission due) apply: see PARAS 105, 109.

11 Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 8(a).

12 Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 8(b).

13 Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, regs 7(1)(a), 8(b).

14 Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 7(1)(b).

15 Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 7(2).

16 le under the Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 7 (see PARA 105).

17 le under the Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 8 (see the text and notes 10-12).

18 Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 9(1). The principal is liable for any sum due under reg 9(1) to the person entitled to it in accordance with that provision, and any sum which the other commercial agent receives to which he is not entitled must be refunded to the principal: reg 9(2).

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/5. RELATIONS BETWEEN PRINCIPAL AND AGENT/(3) RIGHTS OF AGENT AGAINST PRINCIPAL/(ii) Remuneration/108. Agent wrongfully prevented from earning remuneration.

### **108. Agent wrongfully prevented from earning remuneration.**

Subject to the operation of statutory provisions relating to commercial agents<sup>1</sup>, an agent who is prevented from earning his remuneration by the conduct of the principal is entitled to recover damages only if he can show some term of the contract of which the principal is in breach<sup>2</sup>. If an implied term is asserted, the agent must show that the term is necessary to give business efficacy to the contract<sup>3</sup>. Where the agent has done everything to entitle him to receive his remuneration, the measure of damages is the full amount of remuneration which he would have received if the transaction in respect of which it was to be payable had been completed, less expenses and any sum earned in substitution<sup>4</sup>. Where the agent has not done everything to entitle him to remuneration, but has been prevented by an act or default of his principal from being able to earn a remuneration to which he might have been entitled under the terms of his agreement, the measure of damages will be the amount of remuneration which the agent might reasonably have earned in accordance with the terms and duration of the agreement<sup>5</sup>.

If a contract of agency can be performed only with the co-operation of the principal, a term will be implied, to give the contract efficacy, that such co-operation will be forthcoming<sup>6</sup>. Where the principal prevents an agent from earning or continuing to earn commission by disposing of his business or ceasing to trade, this will be wrongful if it constitutes a breach of the agency contract<sup>7</sup>, but a term will not be implied that the principal will not part with his business so as to deprive the agent of commission<sup>8</sup>. Where an estate agent is appointed sole agent for a limited period, it will be a breach of the principal's undertaking for him to appoint a second agent<sup>9</sup>, but it is not a breach of contract if the principal sells the property himself during such period, for such an appointment does not impliedly prohibit the principal from so acting<sup>10</sup>. In other classes of agency, however, the appointment of a sole agent may preclude sale by the principal himself unless the contract otherwise provides<sup>11</sup>. An agent employed to procure a purchaser of property, whether or not the agent is by profession an estate agent, is not wrongfully prevented from earning commission because his principal decides not to proceed with the transaction before a binding contract has been made<sup>12</sup>.

1 le subject to the application of the Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053. As to the meaning of 'commercial agent', and as to the cases to which those regulations apply, see PARA 72. As to the transactions in respect of which an agent is entitled to remuneration see PARAS 104-105.

2 *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108, [1941] 1 All ER 33, HL. See also *Turner v Goldsmith* [1891] 1 QB 544, CA; *Reigate v Union Manufacturing Co (Ramsbottom) Ltd* [1918] 1 KB 592, CA; *Warren & Co v Agdesman* (1922) 38 TLR 588; *Bauman v Hulton Press Ltd* [1952] 2 All ER 1121.

3 *Hamlyn & Co v Wood & Co* [1891] 2 QB 488, CA; *L French & Co Ltd v Leeston Shipping Co Ltd* [1922] 1 AC 451, HL; *Shackleton Aviation Ltd v Maitland Drewery Aviation Ltd* [1964] 1 Lloyd's Rep 293; *Alpha Trading Ltd v Dunshaw-Patten Ltd* [1981] QB 290, [1981] 1 All ER 482, CA. The effect of these cases gives rise to doubt as to

the extent of the authority of *Prickett v Badger* (1856) 1 CBNS 296 (term providing for remuneration, at least on quantum meruit, implied by law rather than as question of fact). For a case where the express term was held to exclude an implied term, see *Rhodes v Forwood* (1876) 1 App Cas 256, HL. Where the agent has done only part of the work he was employed to do, he will recover, if at all, on a quantum meruit basis: see *Inchbald v Western Neigherry Coffee, Tea and Cinchona Plantation Co Ltd* (1864) 17 CBNS 733; *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108, [1941] 1 All ER 33, HL.

4 *Prickett v Badger* (1856) 1 CBNS 296; *Roberts v Barnard* (1884) Cab & El 336. See also *Nahum v Royal Holloway and Bedford New College* [1999] EMLR 252, CA (art dealer wrongfully prevented from assisting with sale of painting due to interference from buyer's agent entitled to a commission from the sale).

5 *Reigate v Union Manufacturing Co (Ramsbottom) Ltd* [1918] 1 KB 592, CA; *Hampton & Sons Ltd v George* [1939] 3 All ER 627.

6 *Mona Oil Equipment and Supply Co Ltd v Rhodesia Railways Ltd* [1949] 2 All ER 1014.

7 *Turner v Goldsmith* [1891] 1 QB 544, CA; *Reigate v Union Manufacturing Co (Ramsbottom) Ltd* [1918] 1 KB 592, CA; *Warren & Co v Agdeshman* (1922) 38 TLR 588; *Nolan v Watson & Co* (1965) 109 Sol Jo 288, CA. The contract cannot be enforced by means of an injunction if this would involve specific performance of an agreement by the principal for personal services: *Page One Records Ltd v Britton (t/a The Troggs)* [1967] 3 All ER 822, [1968] 1 WLR 157. See further, as to when a right to damages arises on termination of the principal's business, PARA 183.

8 *Rhodes v Forwood* (1876) 1 App Cas 256, HL; *Lazarus v Cairn Line of Steamships Ltd* (1912) 106 LT 378; *L French & Co Ltd v Leeston Shipping Co Ltd* [1922] 1 AC 451, HL; *Howard, Houlder & Partners Ltd v Manx Isles Steamship Co Ltd* [1923] 1 KB 110.

9 *Mendoza & Co v Bell* (1952) 159 Estates Gazette 372; *E Christopher & Co v Essig* [1948] WN 461. See also *Simpson v Lamb* (1856) 17 CB 603 (agent appointed to sell advowson).

10 *Bentall, Horsley and Baldry v Vicary* [1931] 1 KB 253; *Sadler v Whittaker* (1953) 162 Estates Gazette 404, CA; *Ronald Preston and Partners v Markheath Securities plc* [1988] 2 EGLR 23. It is, however, a breach if he sells through other agents: *Newton v Erickson* (1951) 157 Estates Gazette 414.

11 *Snelgrove v Ellringham Colliery Co* (1881) 45 JP 408, considered in *WT Lamb & Sons v Goring Brick Co Ltd* [1932] 1 KB 710, CA, where the case was decided on the basis that the transaction was one of vendor and purchaser and not principal and agent. In modern business terminology 'sole' is generally understood to mean that the principal may undertake sales in the agent's territory, whilst 'exclusive' means that the principal is not allowed to compete with the agent in the allotted territory; see PARA 102 note 17. See also *Chinnock v Sainsbury* (1860) 30 LJ Ch 409; *Ronald Preston and Partners v Markheath Securities plc* [1988] 2 EGLR 23.

12 *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108, [1941] 1 All ER 33, HL; *Raymond v Wooten* (1931) 47 TLR 606, DC.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/5. RELATIONS BETWEEN PRINCIPAL AND AGENT/(3) RIGHTS OF AGENT AGAINST PRINCIPAL/(ii) Remuneration/109. Commercial agent's right to information.

### 109. Commercial agent's right to information.

A principal must supply his commercial agent<sup>1</sup> with a statement of the commission due<sup>2</sup>, not later than the last day of the month following the quarter in which the commission has become due, and that statement must set out the main components used in calculating the amount of the commission<sup>3</sup>. Further, a commercial agent is entitled to demand that he be provided with all the information (and in particular an extract from the books) which is available to his principal and which he needs in order to check the amount of the commission due to him<sup>4</sup>. Any agreement to derogate from these provisions is void<sup>5</sup>, although these rules do not prevent reliance on any enactment or rule of law that recognises the right of the agent to inspect the books of the principal<sup>6</sup>.



Both the commercial agent and the principal are entitled to receive from the other on request a signed written document setting out the terms of the agency contract including any terms subsequently agreed<sup>7</sup>.

- 1 As to the meaning of 'commercial agent', and as to the cases to which these provisions apply, see PARA 72.
- 2 As to the meaning of 'commission' see PARA 105 note 2. As to when commission becomes due see PARA 105 note 7.
- 3 Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 12(1).
- 4 Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 12(2).
- 5 Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 12(3).
- 6 Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 12(4).
- 7 Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 13(1). Any purported waiver of this right is void: reg 13(2).

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/5. RELATIONS BETWEEN PRINCIPAL AND AGENT/(3) RIGHTS OF AGENT AGAINST PRINCIPAL/(ii) Remuneration/110. Loss of right to remuneration.

### **110. Loss of right to remuneration.**

An agent who is required by law to possess a particular qualification to enable him to act as such is not entitled to any remuneration if at the time when he rendered the services in respect of which the remuneration is claimed he was not so qualified<sup>1</sup>; nor is an agent entitled to any remuneration in respect of transactions in the course of which he has been guilty of wilful misconduct<sup>2</sup> or breach of faith, whether his principal has been damnified thereby or not<sup>3</sup>, or where the receipt of money for the services he has provided is illegal<sup>4</sup>, or in respect of transactions which were unauthorised by his principal and not subsequently ratified<sup>5</sup>, or which were or must have been known by the agent to be unlawful<sup>6</sup>, or in respect of any services which were rendered abortive by reason of his negligence or other breach of duty<sup>7</sup>. An agent guilty of a breach of duty due to a bona fide mistake may, however, still be entitled to his remuneration<sup>8</sup>.

1 *Palk v Force* (1848) 12 QB 666; *Cope v Rowlands* (1836) 2 M & W 149. Statutory provision is made precluding the recovery of remuneration by persons acting as solicitors who are not qualified or do not have a practising certificate: see the Solicitors Act 1974 s 25; and **LEGAL PROFESSIONS** vol 65 (2008) PARA 590.

2 *Andrews v Ramsay & Co* [1903] 2 KB 635; *Price v Metropolitan House Investment Agency Co Ltd* (1907) 23 TLR 630, CA; *Stubbs v Slater* [1910] 1 Ch 632, CA; *E Green & Son Ltd v G Tughan & Co* (1913) 30 TLR 64; *Rhodes v Macalister* (1923) 29 Com Cas 19, CA; cf *The Macleod* (1880) 5 PD 254. However the agent is entitled to his remuneration in other transactions where he has acted properly (*Hippisley v Knee Bros* [1905] 1 KB 1; *Nitedals Taendstikfabrik v Bruster* [1906] 2 Ch 671), and if he is remunerated by commission, he is entitled to commission for the period prior to his breach of contract (*Graham & Co v United Turkey Red Co Ltd* 1922 SC 533, Ct of Sess).

3 *Salomons v Pender* (1865) 3 H & C 639; *Columbus v Williamson & Co Ltd* [1969] NZLR 708, NZ CA (estate agent in breach of contract not entitled to commission even where principal has successfully sued purchaser).

4 See the Accommodation Agencies Act 1953 s 1; *McInnes v Clarke* [1955] 1 All ER 346, [1955] 1 WLR 102, DC, distinguished in *Saunders v Soper* [1975] AC 239, [1974] 3 All ER 1025, HL; and PARA 282.

5 *Marsh v Jelf* (1862) 3 F & F 234; *Campanari v Woodburn* (1854) 15 CB 400.

6 *Stackpole v Earle* (1761) 2 Wils KB 133; *Josephs v Pebrer* (1825) 3 B & C 639; *Allkins v Jupe* (1877) 2 CPD 375, DC; *Harrington v Victoria Graving Dock Co* (1878) 3 QBD 549.

7 *Denew v Daverell* (1813) 3 Camp 451; *Bracey v Carter* (1840) 12 Ad & El 373; *Dalton v Irwin* (1830) 4 C & P 289; *Hamond v Holiday* (1824) 1 C & P 384. See also *John D Wood & Co (Residential & Agricultural Land) Ltd v Knatchbull* [2002] EWHC 2822 (QB), [2003] 1 EGLR 33, [2002] All ER (D) 232 (Dec) (failure of estate agent to communicate to client vendor the higher selling price of neighbouring property).

8 *Keppel v Wheeler* [1927] 1 KB 577, CA; *Harrods Ltd v Lemon* [1931] 2 KB 157, CA; *Robinson Scammell & Co v Ansell* [1985] 2 EGLR 41, CA (estate agent acting in good faith entitled to commission although he failed to consult the vendors before communicating with the purchasers).

## UPDATE

### 110 Loss of right to remuneration

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/5. RELATIONS BETWEEN PRINCIPAL AND AGENT/(3) RIGHTS OF AGENT AGAINST PRINCIPAL/(iii) Reimbursement and Indemnity/111. Rights of agent.

### (iii) Reimbursement and Indemnity

#### 111. Rights of agent.

The relation of principal and agent raises by implication a contract on the part of the principal to reimburse the agent in respect of all expenses, and to indemnify him against all liabilities, incurred in the reasonable performance of the agency<sup>1</sup>, provided that such implication is not excluded by the express terms of the contract between them<sup>2</sup>, and provided that such expenses and liabilities are in fact occasioned by his employment<sup>3</sup>. The right is not affected by the fact that the payment in respect of which the agent seeks to be indemnified is not a payment for which the principal could be made liable<sup>4</sup>.

The agent may enforce his rights of reimbursement and indemnity by claim, or by the exercise of his lien<sup>5</sup>, and, if he is sued by the principal<sup>6</sup>, he may assert them by way of set-off<sup>7</sup> or counterclaim<sup>8</sup>.

1 *Adamson v Jarvis* (1827) 4 Bing 66; *Frixione v Tagliaferro & Sons* (1856) 10 Moo PCC 175. This includes liabilities arising out of a premature revocation of his authority: *Warlow v Harrison* (1859) 1 E & E 309, Ex Ch. See also *Lazarus v Cairn Line of Steamships Ltd* (1912) 106 LT 378; *Reigate v Union Manufacturing Co (Ramsbottom)* [1918] 1 KB 592, CA; *Wilson v Avec Audio-Visual Equipment Ltd* [1974] 1 Lloyd's Rep 81, CA; *SCF Finance Co Ltd v Masri (No 2)* [1986] 1 All ER 40 (affd [1987] QB 1002, [1987] 1 All ER 175, CA).

2 This will be so in the case of a del credere agent: *Morris v Cleasby* (1816) 4 M & S 566; a del credere agent is, however, entitled to indemnity against losses outside the scope of the del credere commission: *Hooper v Treffry* (1847) 1 Exch 17. As to a del credere agent see PARA 13.

3 *Williams v Lister & Co* (1913) 109 LT 699, CA; and contrast *Halbronn v International Horse Agency and Exchange Ltd* [1903] 1 KB 270; *Tomlinson v Scottish Amalgamated Silks Ltd (Liquidators)* 1935 SC (HL) 1.

Liability is not confined to legal liability: *Rhodes v Fielder, Jones and Harrison* (1919) 89 LJKB 15, DC (barrister's fees).

4 *Brittain v Lloyd* (1845) 14 M & W 762; *Adams v Morgan & Co Ltd* [1924] 1 KB 751, CA. The right to indemnity does not, however, apply in respect of liability, such as to income tax, incurred in respect of profit made by the agent acting as principal: *Re Hollebone's Agreement, Hollebone v WJ Hollebone & Sons Ltd* [1959] 2 All ER 152, [1959] 1 WLR 536, CA.

Where an agent was entitled to be indemnified in respect of the expenses of litigation and was ordered to pay costs on the standard basis, the court might in its discretion order that costs between him and the principal be allowed on the indemnity basis, the costs of proceedings by the agent to recover his indemnity from the principal normally being payable on the standard basis: see *The James Seddon* (1866) LR 1 A & E 62; *Williams v Lister & Co* (1913) 109 LT 699, CA; *Simpson and Miller v British Industries Trust Ltd* (1923) 39 TLR 286. As a consequence of the agent's right to indemnity, it might follow that, where he succeeded in the litigation but only recovered costs on the standard basis, he was entitled to be reimbursed the difference between those costs and costs on the indemnity basis: see *Re Famatina Development Corp Ltd* [1914] 2 Ch 271, CA.

5 As to lien see PARAS 114-118.

6 Or by any person claiming through the principal: *Cropper v Cook* (1868) LR 3 CP 194.

7 *Curtis v Barclay* (1826) 5 B & C 141.

8 As to counterclaims generally see **CIVIL PROCEDURE** vol 11 (2009) PARA 618 et seq.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/5. RELATIONS BETWEEN PRINCIPAL AND AGENT/(3) RIGHTS OF AGENT AGAINST PRINCIPAL/(iii) Reimbursement and Indemnity/112. Extent of indemnity.

## 112. Extent of indemnity.

The right of indemnity covers not merely the losses actually sustained by the agent, but also, in accordance with the principles of equity, the full amount of the liabilities incurred by him, even though they may never in fact be enforced<sup>1</sup>, and extends to cases where they were incurred under an honest mistake of judgment<sup>2</sup>. It is immaterial whether or not the agent professed to be acting on his principal's behalf, if he was in fact so acting<sup>3</sup>.

Where an agent is employed to deal in a particular market or at a particular place, he may acquire rights of reimbursement and indemnity, which he would not otherwise have, in consequence of the usages of the particular market or place<sup>4</sup>. Such usages are binding on the principal, even though unknown to him, if they are reasonable<sup>5</sup>, but not if they are unreasonable<sup>6</sup>, unless his knowledge of them is proved<sup>7</sup>.

1 *Lacey v Hill, Crowley's Claim* (1874) LR 18 Eq 182. See also *British Union and National Insurance Co v Rawson* [1916] 2 Ch 476, CA. A possibility of a future claim is not, however, enough: *Dyson v Peat* [1917] 1 Ch 99.

2 *Broom v Hall* (1859) 7 CBNS 503; *Pettman v Keble* (1850) 9 CB 701.

3 *Re Fox, Walker & Co, ex p Bishop* (1880) 15 ChD 400, CA; *Re Rogers, ex p Rogers* (1880) 15 ChD 207, CA.

4 *Bayliffe v Butterworth* (1847) 1 Exch 425; *Anglo Overseas Transport Ltd v Titan Industrial Corp (United Kingdom) Ltd* [1959] 2 Lloyd's Rep 152 (London freight market); *Perishables Transport Co Ltd v N Spyropoulos (London) Ltd* [1964] 2 Lloyd's Rep 379. As to post-termination indemnity under the Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, see reg 17; and PARA 178. As to the effect of usages generally see PARA 44.

5 *Reynolds v Smith* (1893) 9 TLR 494, HL; *Chapman v Shepherd* (1867) LR 2 CP 228.

6 *Perry v Barnett* (1885) 15 QBD 388, CA.

7 *Seymour v Bridge* (1885) 14 QBD 460. As to custom and usage see further PARA 44.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/5. RELATIONS BETWEEN PRINCIPAL AND AGENT/(3) RIGHTS OF AGENT AGAINST PRINCIPAL/(iii) Reimbursement and Indemnity/113. Liabilities to which right does not extend.

### **113. Liabilities to which right does not extend.**

An agent is not entitled to reimbursement or indemnity in respect of expenses or liabilities incurred in consequence of his own default<sup>1</sup> or breach of duty<sup>2</sup>, or transactions which are outside the scope of his authority and have not been ratified by his principal<sup>3</sup>. There is no right of indemnity in respect of the consequences of transactions involving a breach of the criminal law where the party performing them knows that they are unlawful<sup>4</sup>, or where, being ignorant of their illegality, he knows the circumstances which render them unlawful<sup>5</sup>, or where the transaction is contrary to public policy<sup>6</sup>. Consequently an agent who makes a contract which is prohibited by statute<sup>7</sup>, or makes payments which it is criminally illegal for him to make<sup>8</sup>, is not only debarred from recovering any remuneration but is also not entitled to any indemnity against his expenses in such transaction<sup>9</sup>.

Where the agent's conduct amounts to a tort, but not a crime, he is at common law entitled to be indemnified against expenses and liabilities if the transaction was not manifestly tortious or tortious to his knowledge<sup>10</sup>. Where an agent incurs liability to a third party in respect of a tort committed with the authority of his principal, he is entitled to such contribution from his principal as the court considers to be just and equitable having regard to the extent of their respective responsibility for the damage<sup>11</sup>. Such contribution may take the form of a complete indemnity<sup>12</sup>, but where the principal is entitled to be indemnified by the agent against such damage, the agent will not be entitled to any contribution<sup>13</sup>.

Where a principal desiring to speculate in shares or commodities employs an agent to buy or sell on his behalf on the recognised stock exchanges or commodity or produce exchanges or markets, the principal intending throughout only to pay or receive differences, the agent will be entitled to be indemnified against losses incurred in these transactions in so far as he has entered into genuine contracts with third parties who are not parties to an agreement or tacit understanding that there shall be no obligation on either party to take or deliver but that differences only shall be payable<sup>14</sup>. The agent's right is not affected by knowledge that his principal does not expect to be called upon to settle the transaction except by payment of differences<sup>15</sup>. The fact that the contract effected through the agent is made subject to the rules of the stock or other exchange, or contains a term that one party or other can require delivery, does not preclude evidence that it was in fact a gaming or wagering transaction<sup>16</sup>.

1 *Lewis v Samuel* (1846) 8 QB 685; *Duncan v Hill* (1873) LR 8 Exch 242; see also *Goulandris Bros Ltd v B Goldman & Sons Ltd* [1958] 1 QB 74, [1957] 3 All ER 100.

2 *Ellis v Pond* [1898] 1 QB 426, CA; *Thomas v Atherton* (1878) 10 ChD 185, CA; *Solloway v McLaughlin* [1938] AC 247, [1937] 4 All ER 328, PC.

3 *Bowlby v Bell* (1846) 3 CB 284; and contrast *Hartas v Ribbons* (1889) 22 QBD 254, CA; *Colonial Bank of Australasia v Marshall* [1906] AC 559, PC; *Johnson v Kearley* [1908] 2 KB 514, CA; and cf *Aston v Kelsey* [1913] 3 KB 314, CA; *Blaker v Hawes and Brown* (1913) 109 LT 320.

4 *Smith v White* (1866) LR 1 Eq 626. Cf *R Leslie Ltd v Reliable Advertising and Addressing Agency Ltd* [1915] 1 KB 652.

5 See *Burrows v Rhodes* [1899] 1 QB 816; *Haseldine v Hosken* [1933] 1 KB 822, CA; and **CONTRACT** vol 9(1) (Reissue) PARA 839 et seq.

- 6 *Herman v Jeuchner* (1885) 15 QBD 561, CA; and see **CONTRACT** vol 9(1) (Reissue) PARA 841 et seq.
- 7 *Ex p Mather* (1797) 3 Ves 373; *Warwick v Slade* (1811) 3 Camp 127.
- 8 *Josephs v Pebrer* (1825) 3 B & C 639; *Re Parker* (1882) 21 ChD 408, CA (unlawful payments by election agent).
- 9 See the cases cited in notes 7, 8. It is otherwise where the indemnity is sought in respect of expenses which are distinct from the illegal transaction: *Lindo v Smith* (1858) 5 CBNS 587, Ex Ch. See the Accommodation Agencies Act 1953 s 1; *McInnes v Clarke* [1955] 1 All ER 346, [1955] 1 WLR 102, DC, distinguished in *Saunders v Soper* [1975] AC 239, [1974] 3 All ER 1025, HL; and PARA 282.
- 10 *Adamson v Jarvis* (1827) 4 Bing 66; *Betts and Drewe v Gibbins* (1834) 2 Ad & El 57; *W Cory & Son Ltd v Lambton and Hetton Collieries Ltd* (1916) 86 LJBK 401, CA.
- 11 See the Civil Liability (Contribution) Act 1978 ss 1, 2; **DAMAGES** vol 12(1) (Reissue) PARA 842 et seq; **TORT** vol 45(2) (Reissue) PARA 349 et seq.
- 12 See the Civil Liability (Contribution) Act 1978 s 2(2); **DAMAGES** vol 12(1) (Reissue) PARA 844; **TORT** vol 45(2) (Reissue) PARA 352.
- 13 See the Civil Liability (Contribution) Act 1978 s 2(2), (3); **DAMAGES** vol 12(1) (Reissue) PARAS 844-845; **TORT** vol 45(2) (Reissue) PARA 352. See also *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555, [1957] 1 All ER 125, HL (employer and employee).
- 14 *Thacker v Hardy* (1878) 4 QBD 685, CA; *Forget v Ostigny* [1895] AC 318, PC; *Ironmonger & Co v Dyne* (1928) 44 TLR 497, CA; *Barnett v Sanker* (1925) 41 TLR 660; *Weddle, Beck & Co v Hackett* [1929] 1 KB 321; *Cunliffe-Owen v Teather and Greenwood* [1967] 3 All ER 561, [1967] 1 WLR 1421.
- 15 *Thacker v Hardy* (1878) 4 QBD 685, CA; *Forget v Ostigny* [1895] AC 318, PC; *Re Rogers, ex p Rogers* (1880) 15 ChD 207, CA; *Barnett v Sanker* (1925) 41 TLR 660; *H W Franklin & Co Ltd v Dawson* (1913) 29 TLR 479.
- 16 *Universal Stock Exchange v Strachan* [1896] AC 166, HL; *Re Gieve* [1899] 1 QB 794, CA; *Weddle, Beck & Co v Hackett* [1929] 1 KB 321.

## UPDATE

### 113 Liabilities to which right does not extend

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/5. RELATIONS BETWEEN PRINCIPAL AND AGENT/(3) RIGHTS OF AGENT AGAINST PRINCIPAL/(iv) Lien/114. For what claims agent has lien.

## (iv) Lien

### 114. For what claims agent has lien.

Every agent has a lien on the goods and chattels of his principal in respect of all claims against the principal<sup>1</sup> arising out of his employment, whether for remuneration earned, or for expenses or liabilities incurred, except where the right of lien is inconsistent with the contract between the parties<sup>2</sup>, or with the special purpose for which the goods or chattels were entrusted to him<sup>3</sup>.

The lien of an agent is, as a rule, a particular lien, confined to such claims as arise in connection with the goods and chattels in respect of which the right is claimed<sup>1</sup>. He may, however, be given a general lien, extending to all claims arising out of the agency, either by express contract or by usage<sup>5</sup>.

1 Including those that are statute-barred (*Spears v Hartly* (1800) 3 Esp 81), but not in respect of a mere possibility of liability (*Dyson v Peat* [1917] 1 Ch 99).

2 *Re Bowes, Earl of Strathmore v Vane* (1886) 33 ChD 586; *Wolstenholm v Sheffield Union Banking Co Ltd* (1886) 54 LT 746, CA. The inconsistency must be clear: *Fisher v Smith* (1868) 4 App Cas 1, HL; *Rolls Razor Ltd v Cox* [1967] 1 QB 552, [1967] 1 All ER 397, CA.

3 *Brandao v Barnett* (1846) 3 CB 519; *Burn v Brown* (1817) 2 Stark 272; *Skinner v Reed's Trustee* [1967] Ch 1194, [1967] 2 All ER 1286 (auctioneer has lien only on so much of deposit as becomes the property of the vendor).

4 *Bock v Gorrissen* (1861) 30 LJ Ch 39, CA; see also *Williams v Millington* (1788) 1 Hy Bl 81. As to particular liens see **LIEN** vol 68 (2008) PARAS 838-845.

5 There is no lien in respect of claims accruing before the agency began: *Houghton v Matthews* (1803) 3 Bos & P 485. A general lien is possessed by factors (*Baring v Corrie* (1818) 2 B & Ald 137; *Hammonds v Barclay* (1802) 2 East 227), bankers (*London Chartered Bank of Australia v White* (1879) 4 App Cas 413, PC), insurance brokers (*Mann v Forrester* (1814) 4 Camp 60), solicitors (*Re Broomhead* (1847) 5 Dow & L 52; Solicitors Act 1974 s 73), stockbrokers (*Re London and Globe Finance Corpn* [1902] 2 Ch 416), wharfingers (*Spears v Hartly* (1800) 3 Esp 81), and packers (*Re Witt, ex p Shubrook* (1876) 2 ChD 489, CA); see **LIEN** vol 68 (2008) PARAS 828-837. As to the lien of a ship's master see the Merchant Shipping Act 1995 s 41; and **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 477.

## UPDATE

### 114 For what claims agent has lien

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/5. RELATIONS BETWEEN PRINCIPAL AND AGENT/(3) RIGHTS OF AGENT AGAINST PRINCIPAL/(iv) Lien/115. Possession necessary.

### 115. Possession necessary.

To enable an agent to exercise his lien, the goods must be in his possession, actual<sup>1</sup> or constructive<sup>2</sup>. The possession must have been acquired without breach of duty<sup>3</sup>, and the agent must hold the goods by virtue of the same agency as that under which he claims the lien<sup>4</sup>.

1 *Ridgway v Lees* (1856) 25 LJ Ch 584; *Kinloch v Craig* (1790) 3 Term Rep 783, HL.

2 *Bryans v Nix* (1839) 4 M & W 775. See also *Langley, Beldon and Gaunt Ltd v Morley* [1965] 1 Lloyd's Rep 297 (forwarding agents who had parted with possession held not to have a general lien).

3 *Walshe v Provan* (1853) 8 Exch 843; *Madden v Kempster* (1807) 1 Camp 12; and cf *Barratt v Gough-Thomas* [1951] Ch 242, [1950] 2 All ER 1048, CA (solicitor cannot set up lien if thereby he asserts right inconsistent with his legal obligations).

4 *Misa v Currie* (1876) 1 App Cas 554, HL; *Dixon v Stansfield* (1850) 10 CB 398; *Barratt v Gough-Thomas* [1951] Ch 242, [1950] 2 All ER 1048, CA.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/5. RELATIONS BETWEEN PRINCIPAL AND AGENT/(3) RIGHTS OF AGENT AGAINST PRINCIPAL/(iv) Lien/116. Lien affecting third parties.

### 116. Lien affecting third parties.

As against third persons, the agent cannot, by the exercise of his lien, deprive them of their existing rights in respect of the goods, except in so far as the principal could have done so<sup>1</sup> or statute so provides<sup>2</sup>. An agent's lien on negotiable instruments and money entrusted to him is absolute, notwithstanding any defects in the title of the principal<sup>3</sup>, provided that, when the lien attached, the agent had no notice of any such defects<sup>4</sup>.

1 Cf *Brunton v Electrical Engineering Corpn* [1892] 1 Ch 434 with *Re Capital Fire Insurance Association* (1883) 24 ChD 408, CA (a winding-up order cannot defeat a valid lien existing at the time when the winding-up petition is presented); *Re Rapid Road Transit Co* [1909] 1 Ch 96; and see *Turner v Letts* (1855) 20 Beav 185; *Barry v Longmore* (1840) 12 Ad & El 639; *Copland v Stein* (1799) 8 Term Rep 199; see also the Insolvency Act 1986 s 284(4); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 217.

2 See eg the Factors Act 1889 ss 8, 9; the Sale of Goods Act 1979 ss 24-26; and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARAS 157-158.

3 *Brandao v Barnett* (1846) 3 CB 519; *Bank of New South Wales v Goulburn Valley Butter Co Pty Ltd* [1902] AC 543, PC; *Jones v Peppercorne* (1858) John 430; and cf *London Joint Stock Bank v Simmons* [1892] AC 201, HL; *Bechuanaland Exploration Co v London Trading Bank Ltd* [1898] 2 QB 658.

4 *Solomons v Bank of England* (1791) 13 East 135n; *Jeffries v Agra and Masterman's Bank* (1866) LR 2 Eq 674.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/5. RELATIONS BETWEEN PRINCIPAL AND AGENT/(3) RIGHTS OF AGENT AGAINST PRINCIPAL/(iv) Lien/117. Loss of lien.

### 117. Loss of lien.

An agent loses his lien by parting with the possession of the goods<sup>1</sup>, unless at the time of parting with them he reserves expressly or by implication his right of lien<sup>2</sup>, or they are obtained from him by fraud or other unlawful means<sup>3</sup>. He may also, whilst remaining in possession of the goods, lose his lien by dealing with them in any way which is inconsistent with its continuance<sup>4</sup>, or by entering into any agreement<sup>5</sup>, or doing any act<sup>6</sup> which necessarily implies its abandonment, or if the character and legal basis of his possession is changed<sup>7</sup>. The lien is not affected by the subsequent bankruptcy of the principal<sup>8</sup>.

1 *Sweet v Pym* (1800) 1 East 4; *Langley, Beldon and Gaunt Ltd v Morley* [1965] 1 Lloyd's Rep 297.

2 *Watson v Lyon* (1855) 7 De GM & G 288; *North Western Bank Ltd v Poynter, Son and Macdonalds* [1895] AC 56, HL; *Albermarle Supply Co Ltd v Hind & Co* [1928] 1 KB 307, CA; *Caldwell v Sumpters (a firm)* [1972] Ch 478, [1972] 1 All ER 567, CA.

3 *Dicas v Stockley* (1836) 7 C & P 587; *Wallace v Woodgate* (1824) Ry & M 193.

4 *Weeks v Goode* (1859) 6 CBNS 367; *Jacobs v Latour* (1828) 5 Bing 130.

5 *The Rainbow* (1885) 53 LT 91.

6 *Re Taylor, Stileman and Underwood, ex p Payne Collier* [1891] 1 Ch 590, CA. The mere taking of security is not by itself sufficient (*Angus v McLachlan* (1883) 23 ChD 330).

7 *Barratt v Gough-Thomas* [1951] Ch 242, [1950] 2 All ER 1048, CA.

8 *Robson v Kemp* (1802) 4 Esp 233; *Re Capital Fire Insurance Association* (1883) 24 ChD 408, CA.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/5. RELATIONS BETWEEN PRINCIPAL AND AGENT/(3) RIGHTS OF AGENT AGAINST PRINCIPAL/(iv) Lien/118. Lien of sub-agent.

### **118. Lien of sub-agent.**

A sub-agent has, in general, no right of lien against the principal as such<sup>1</sup>. If, however, he is employed with the authority of the principal, and at the time when the right attaches he is unaware of the existence of a principal, he has the same right of lien against him as he would have had if the agent employing him had been the principal<sup>2</sup>; and although he may be aware of the principal's existence, he has a similar right of lien against the principal in respect of claims arising out of the transaction in which he was employed as sub-agent, notwithstanding any settlement between the principal and the agent<sup>3</sup>; but his general lien, if any, is co-extensive with the actual rights of the agent in that behalf, and no wider<sup>4</sup>.

1 *Solly v Rathbone* (1814) 2 M & S 298. As to the power of a bailee to subject to an artificer's lien the goods bailed to him see *Tappenden (t/a English and American Autos) v Artus* [1964] 2 QB 185, [1963] 3 All ER 213, CA; as to the lien of a marine insurance broker see the Marine Insurance Act 1906 s 53(2); *Near East Relief v King, Chausseur & Co Ltd* [1930] 2 KB 40; and **INSURANCE** vol 25 (Reissue) PARAS 274-275.

2 *Taylor v Kymer* (1832) 3 B & Ad 320; *Mann v Forrester* (1814) 4 Camp 60; *New Zealand and Australian Land Co v Watson* (1881) 7 QBD 374, CA.

3 *Fisher v Smith* (1878) 4 App Cas 1, HL.

4 *Mildred, Goyeneche & Co v Maspons Y Hermano* (1883) 8 App Cas 874, HL; *Ex p Edwards* (1881) 8 QBD 262, CA.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/5. RELATIONS BETWEEN PRINCIPAL AND AGENT/(3) RIGHTS OF AGENT AGAINST PRINCIPAL/(v) Stoppage in Transit/119. Stoppage in transit.

### **(v) Stoppage in Transit**

#### **119. Stoppage in transit.**

If an agent has bought goods on behalf of his principal, either with his own money<sup>1</sup>, or under such circumstances as to incur a personal liability towards the seller for the price<sup>2</sup>, he stands towards his principal in the position of an unpaid seller<sup>3</sup>, and on delivery to a carrier for transmission to the principal, possesses the same rights of stoppage in transit<sup>4</sup>.

1 *Jenkyns v Brown* (1849) 14 QB 496.

2 As to the circumstances in which a personal liability is incurred see PARA 158.



3 See the Sale of Goods Act 1979 s 38(2); and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 241. See also *Feise v Wray* (1802) 3 East 93; *Falk v Fletcher* (1865) 18 CBNS 403; and see *Cassaboglou v Gibb* (1883) 11 QBD 797, CA.

4 *Ireland v Livingston* (1872) LR 5 HL 395; *Imperial Bank v London and St Katharine Docks Co* (1877) 5 ChD 195.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/5. RELATIONS BETWEEN PRINCIPAL AND AGENT/(3) RIGHTS OF AGENT AGAINST PRINCIPAL/(vi) Interpleader/120. Right to interplead.

## (vi) Interpleader

### 120. Right to interplead.

Where, by virtue of his agency, an agent is in possession of any money, goods or chattels<sup>1</sup>, to which conflicting claims are made by his principal and a third person, he may interplead<sup>2</sup> notwithstanding his agency<sup>3</sup>, even though he has expressly attorned to his principal<sup>4</sup>. If, at the time of so attorning, the agent had notice of the claim of the third party, he may be estopped, as against his principal, from denying the latter's title, and so be unable to interplead<sup>5</sup>.

The agent must, however, stand in a position of real impartiality between the claimants<sup>6</sup>, and therefore he must not collude with either<sup>7</sup>, nor claim any interest in the subject matter except for his costs and charges<sup>8</sup>. A claim of lien in respect of the latter does not oust him from his right<sup>9</sup>. He cannot interplead if he claims any further lien or interest<sup>10</sup>, nor can he interplead where one of the claimants claims unliquidated damages<sup>11</sup>.

1 This includes choses in action: *Robinson v Jenkins* (1890) 24 QBD 275, CA.

2 See CPR Sch 1 RSC Ord 17, Sch 2 CCR Ord 33; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1585 et seq.

3 *Ex p Mersey Docks and Harbour Board* [1899] 1 QB 546; *Attenborough v London and St Katherine's Dock Co* (1878) 3 CPD 450, CA; *Tanner v European Bank* (1866) LR 1 Exch 261.

4 *Ex p Mersey Docks and Harbour Board* [1899] 1 QB 546.

5 Cf *Re Sadler, ex p Davies* (1881) 19 ChD 86, CA; and see PARA 95.

6 *Murietta v South American, etc, Co Ltd* (1893) 62 LJQB 396.

7 See CPR Sch 1 RSC Ord 17 r 3(4)(b), Sch 2 CCR Ord 33 r 6(3)(b); and **CIVIL PROCEDURE** vol 12 (2009) PARAS 1602, 1639. It is collusion to agree with one claimant to do what the agent legally can to defeat the other (*Murietta v South American, etc, Co Ltd* (1893) 62 LJQB 396), or to take an indemnity from one of them (*Tucker v Morris* (1832) 1 Cr & M 73), though the party giving the indemnity cannot raise this objection (*Thompson v Wright* (1884) 13 QBD 632).

8 CPR Sch 1 RSC Ord 17 r 3(4)(a), Sch 2 CCR Ord 33 r 6(3)(a); *Best v Hayes* (1863) 1 H & C 718; and **CIVIL PROCEDURE** vol 12 (2009) PARAS 1602, 1639.

9 *Cotter v Bank of England* (1833) 3 Moo & S 180; *Attenborough v London and St Katharine's Dock Co* (1878) 3 CPD 450, CA.

10 *Mitchell v Hayne* (1824) 2 Sim & St 63.

11 *Ingham v Walker* (1887) 3 TLR 448, CA.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/6. RELATIONS BETWEEN PRINCIPAL AND THIRD PERSONS/(1) PRINCIPAL'S LIABILITY FOR AGENT'S ACTS/121. General rule.

## **6. RELATIONS BETWEEN PRINCIPAL AND THIRD PERSONS**

### **(1) PRINCIPAL'S LIABILITY FOR AGENT'S ACTS**

#### **121. General rule.**

As a general rule, a principal is responsible for all acts of his agent within the authority of the agent, whether the responsibility is contractual<sup>1</sup> or tortious<sup>2</sup>. Similarly the principal will be bound by many dispositions of property made by the agent<sup>3</sup>. In some exceptional instances, a principal may be criminally liable even where he does not himself take part in, authorise or connive at the act or default of the agent<sup>4</sup>.

1 See PARAS 125-140.

2 See PARAS 150-154.

3 See PARAS 144-149.

4 See PARA 155.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/6. RELATIONS BETWEEN PRINCIPAL AND THIRD PERSONS/(1) PRINCIPAL'S LIABILITY FOR AGENT'S ACTS/122. Fraudulent motive of agent immaterial.

#### **122. Fraudulent motive of agent immaterial.**

A principal is not exempt, where he would otherwise be liable in respect of an act done or bound by a contract made by his agent, by reason of the fact that the agent in doing it was acting in fraud of the principal<sup>1</sup>, or otherwise to his detriment<sup>2</sup>. A third party dealing in good faith with an agent, who acts within the apparent scope of his authority, and purports to act as agent<sup>3</sup>, is not prejudiced by the fact that the agent is using his authority for his own benefit and not that of his principal<sup>4</sup>.

1 *Hambro v Burnand* [1904] 2 KB 10, CA; *Montague v Perkins* (1853) 22 LJCP 187; *Summers v Solomon* (1857) 7 E & B 879; *Meyer & Co Ltd v Sze Hai Tong Banking and Insurance Co Ltd* [1913] AC 847, PC; *Navarro v Moregrand Ltd* [1951] WN 335, CA.

2 *Hawken v Bourne* (1841) 8 M & W 703; *Howard v Sheward* (1866) LR 2 CP 148; *Wing v Harvey* (1854) 5 De GM & G 265.

3 *AL Underwood Ltd v Bank of Liverpool and Martins* [1924] 1 KB 775, CA.

4 *Lloyd v Grace, Smith & Co* [1912] AC 716, HL; *Lloyds Bank Ltd v Chartered Bank of India, Australia and China* [1929] 1 KB 40, CA; *Uxbridge Permanent Benefit Building Society v Pickard* [1939] 2 KB 248, [1939] 2 All ER 344, CA. The fact that the agent is acting in his own interests may negative actual authority and put the third party on notice as regards apparent authority: *Biggar v Rock Life Assurance Co* [1902] 1 KB 516; *Midland Bank Ltd v Reckitt* [1933] AC 1, HL.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/6. RELATIONS BETWEEN PRINCIPAL AND THIRD PERSONS/(1) PRINCIPAL'S LIABILITY FOR AGENT'S ACTS/123. Effect of limitation of authority.

### 123. Effect of limitation of authority.

Where a principal, in conferring authority upon his agent to act on his behalf, imposes conditions<sup>1</sup> or limitations<sup>2</sup> on its exercise, no act done by the agent in excess of the conditional or limited authority is treated as the act of the principal as regards such persons as have<sup>3</sup> or ought to have<sup>4</sup> notice of such excess of authority, or have had notice of an irregularity placing them upon inquiry as to whether the agent's authority was being exceeded<sup>5</sup>. In the absence of notice, however, the principal cannot escape liability for acts done by the agent which fall within the apparent scope of his authority, by any particular instructions to his agent limiting his authority<sup>6</sup>.

1 *Jordan v Norton* (1838) 4 M & W 155.

2 *Jacobs v Morris* [1902] 1 Ch 816, CA; *Balfour v Ernest* (1859) 5 CBNS 601.

3 *Evans v Kymer* (1830) 1 B & Ad 528; *Bodenham v Hoskyns* (1852) 2 De GM & G 903; *Cuthbert v Robarts, Lubbock & Co* [1909] 2 Ch 226, CA; *Forman & Co Pty v The Liddesdale* [1900] AC 190, PC; *Russo-Chinese Bank v Li Yau Sam* [1910] AC 174, PC; *Doey v London and North Western Rly Co* [1919] 1 KB 623, DC; *Reckitt v Barnett, Pembroke and Slater Ltd* [1929] AC 176, HL. Cf *A-G for Ceylon v Silva* [1953] AC 461, [1953] 2 WLR 1185, PC (representation as to the extent of the authority made solely by the agent did not bind principal); *Armagas Ltd v Mundogas SA, The Ocean Frost* [1986] AC 717, [1986] 2 All ER 385, [1986] 2 Lloyd's Rep 109, HL.

4 *Hatch v Searles* (1854) 2 Sm & G 147; *Flight v Provident Association of London Ltd* (1895) 12 TLR 51, CA; *Cuthbert v Robarts, Lubbock & Co* [1909] 2 Ch 226, CA; *Morison v Kemp* (1912) 29 TLR 70; *Morison v London County and Westminster Bank Ltd* [1914] 3 KB 356, CA; *Lloyds Bank Ltd v Chartered Bank of India, Australia and China* [1929] 1 KB 40, CA; *Reckitt v Barnett, Pembroke and Slater Ltd* [1929] AC 176, HL. As to limitation usual in a particular business see *Baines v Ewing* (1866) LR 1 Exch 320; *Daun v Simmins* (1879) 41 LT 783, CA. As to the effect of limitations under the memorandum or articles of association of a company within the meaning of the Companies Act 1985 see PARA 8. For the effect of signatures by procuration and analogous signatures on bills of exchange etc see *Midland Bank Ltd v Reckitt* [1933] AC 1, HL; the Bills of Exchange Act 1882 s 25; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1474.

5 *AL Underwood Ltd v Bank of Liverpool and Martins* [1924] 1 KB 775, CA; *Lloyds Bank Ltd v Chartered Bank of India, Australia and China* [1929] 1 KB 40, CA; *Navarro v Moregrand Ltd* [1951] WN 335, CA.

6 *National Bolivian Navigation Co v Wilson* (1880) 5 App Cas 176, HL; *Trickett v Tomlinson* (1863) 13 CBNS 663; *Duke of Beaufort v Neeld* (1845) 12 Cl & Fin 248, HL; *Davy v Waller* (1899) 81 LT 107; *Edmunds v Bushell and Jones* (1865) LR 1 QB 97; *Limpus v London General Omnibus Co Ltd* (1862) 1 H & C 526, Ex Ch; *Roper v SS Fort Lamy (Managers)* (1943) 36 BWCC 255, CA; *Pharmed Medicare Private Ltd v Univar Ltd* [2002] EWCA Civ 1569, [2003] 1 All ER (Comm) 321. As to implied authority see further PARAS 37-44.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/6. RELATIONS BETWEEN PRINCIPAL AND THIRD PERSONS/(1) PRINCIPAL'S LIABILITY FOR AGENT'S ACTS/124. Act beyond actual or apparent scope of authority.

### 124. Act beyond actual or apparent scope of authority.

Where an act done by an agent is not within the scope of his express or implied authority<sup>1</sup>, or falls outside the apparent scope of his authority<sup>2</sup>, the principal is not bound by, or liable for, that act<sup>3</sup>, even if the opportunity to do it arose out of the agency<sup>4</sup>, and it was purported to be done on his behalf<sup>5</sup>, unless he expressly adopted it by taking the benefit of it<sup>6</sup> or otherwise<sup>7</sup>.

Where the agent obtains the money or property of a third person by means of any act beyond the actual or apparent scope of his authority, the principal is not responsible unless the money<sup>8</sup> or property<sup>9</sup> or the proceeds thereof<sup>10</sup> have been received by him<sup>11</sup>, or have been applied for his benefit<sup>12</sup>, in which case he becomes liable to the extent of the benefit received<sup>13</sup>.

When a principal has mistakenly paid money to a third party in respect of unauthorised contracts by which he is not bound, he may recover the money as money paid by mistake<sup>14</sup>.

1 *McGowan & Co v Dyer* (1873) LR 8 QB 141; *Re Cunningham & Co Ltd, Simpson's Claim* (1887) 36 ChD 532; *Watkin v Lamb* (1901) 85 LT 483; *Biggar v Rock Life Assurance Co* [1902] 1 KB 516; *Barnett v South London Tramways Co* (1887) 18 QBD 815, CA; *George Whitechurch Ltd v Cavanagh* [1902] AC 117, HL; *M'Millan v Accident Insurance Co* 1907 SC 484; *Connors v London and Provincial Assurance Co* (1913) 6 BWCCN 146; *Thornton-Smith v Motor Union Insurance Co Ltd* (1913) 30 TLR 139; *Newsholme Bros v Road Transport and General Insurance Co Ltd* [1929] 2 KB 356, CA; *Dunn v Ocean Accident and Guarantee Corp Ltd* (1933) 50 TLR 32; *Re Transplanters (Holding Co) Ltd* [1958] 2 All ER 711, [1958] 1 WLR 822; *Armagas Ltd v Mundogas SA* [1986] AC 717, [1986] 2 All ER 385, HL.

2 *Linford v Provincial Horse and Cattle Insurance Co* (1864) 34 Beav 291; *Newlands v National Employers' Accident Association Ltd* (1885) 54 LJQB 428, CA; *Re Southport and West Lancashire Banking Co* (1885) 1 TLR 204, CA; *Xenos v Wickham* (1866) LR 2 HL 296; *Spooner v Browning* [1898] 1 QB 528, CA; *Levy v Scottish Employers' Insurance Co* (1901) 17 TLR 229, DC; *Wright v Glyn* [1902] 1 KB 745, CA; *Comerford v Britannic Assurance Co* (1908) 24 TLR 593.

3 Nor can it amount to an act of bankruptcy by the principal: *Re Sawers, ex p Blain* (1879) 12 ChD 522, CA. Statute may, however, impose responsibility for the acts of an agent: see eg the Sex Discrimination Act 1975 s 41(2); the Race Relations Act 1976 s 32(2); the Disability Discrimination Act 1995 s 58(2); and **DISCRIMINATION** vol 13 (2007 Reissue) PARAS 391, 476, 527.

4 *Ruben v Great Fingall Consolidated* [1906] AC 439, HL; *Truman v Attenborough* (1910) 103 LT 218.

5 See the cases cited in notes 1, 4.

6 *Jacobs v Morris* [1902] 1 Ch 816, CA.

7 As to ratification see PARAS 57-70.

8 *Bannatyne v MacIver* [1906] 1 KB 103, CA; *Reid v Rigby & Co* [1894] 2 QB 40.

9 *Glyn v Baker* (1811) 13 East 509.

10 *Marsh v Keating* (1834) 1 Bing NC 198, HL.

11 *Glyn v Baker* (1811) 13 East 509; *Marsh v Keating* (1834) 1 Bing NC 198, HL. See also *Kettlewell v Refuge Assurance Co* [1908] 1 KB 545, CA (affd sub nom *Refuge Assurance Co Ltd v Kettlewell* [1909] AC 243, HL); *Holdsworth v Lancashire and Yorkshire Insurance Co* (1907) 23 TLR 521; *Murfitt v Royal Insurance Co* (1922) 38 TLR 334.

12 *Bannatyne v MacIver* [1906] 1 KB 103, CA; *Reid v Rigby & Co* [1894] 2 QB 40; *Re Japanese Curtains and Patent Fabric Co Ltd, ex p Shoolbred* (1880) 28 WR 339; *Blackburn Building Society v Cunliffe Brooks & Co* (1882) 22 ChD 61, CA (affd sub nom *Cunliffe Brooks & Co v Blackburn and District Benefit Building Society* (1884) 9 App Cas 857, HL); *Reversion Fund and Insurance Co Ltd v Maison Cosway Ltd* [1913] 1 KB 364, CA; *B Liggett (Liverpool) Ltd v Barclays Bank Ltd* [1928] 1 KB 48; see also *Re Cleadon Trust Ltd* [1939] Ch 286, [1938] 4 All ER 518, CA.

13 If, however, the third person was indebted to the principal, and the unauthorised act relates to the mode of enforcing payment, the principal is entitled to keep the benefit without being liable for the agent's act: *Freeman v Rosher* (1849) 13 QB 780; *Lewis v Read* (1845) 13 M & W 834; but contrast *Haseler v Lemoyne* (1858) 5 CBNS 530, where there was in fact a ratification (all cases of distress for rent).

14 *Bailey and Whites Ltd v House* (1915) 31 TLR 583, DC. As to the recovery of payments made under a mistake of fact see **MISTAKE** vol 77 (2010) PARA 70. As to contracts on which the principal will be bound see PARA 125.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/6. RELATIONS BETWEEN PRINCIPAL AND THIRD PERSONS/(2) CONTRACTUAL RELATIONS/(i) Enforcement Generally/125. Rights and liabilities of principal.

## **(2) CONTRACTUAL RELATIONS**

### **(i) Enforcement Generally**

#### **125. Rights and liabilities of principal.**

As a general rule<sup>1</sup>, any contract made by an agent with the authority<sup>2</sup> of his principal may be enforced by<sup>3</sup> or against<sup>4</sup> the principal where his name or existence was disclosed to the other contracting party at the time when the contract was made<sup>5</sup>.

Where the principal is undisclosed, the authorised contract of the agent may also as a general rule be enforced by or against the principal<sup>6</sup>. If, however, the agent contracts in such terms as to imply that he is the real and only principal, evidence to contradict the terms of the contract will not be admitted<sup>7</sup>. Whether he has contracted in such terms or not depends upon the construction of the particular contract<sup>8</sup>. Where an agent contracts in his own name but not in terms which are consistent only with his having done so as principal, oral evidence may be admitted to prove the identity of the principal<sup>9</sup>.

If a person contracts with an agent honestly believing<sup>10</sup> him to be the principal and makes the contract with the agent for reasons personal to the agent, the real principal cannot sue upon the contract<sup>11</sup>. If, however, the agent's contract related to the principal's goods, the principal may have a right to claim against the other contracting party for conversion<sup>12</sup> or upon an implied contract to pay for the goods<sup>13</sup>.

Where a contract is made without the actual or ostensible authority of the principal, it cannot be enforced by or against the principal, unless it is a contract which purports to be made on behalf of a principal<sup>14</sup> and is capable of being, and has been, ratified by the principal in question<sup>15</sup>.

1 For the exceptions to this rule see PARAS 127-131.

2 'Authority' means all types of authority and not merely express authority: see generally PARA 121.

3 If the agent has begun a claim against the other contracting party, the principal may intervene: *Sadler v Leigh* (1815) 4 Camp 195.

4 Including the Crown: see *Thomas v R* (1874) LR 10 QB 31. See also *Camillo Tank Steamship Co Ltd v Alexandria Engineering Works* (1921) 38 TLR 134, HL.

5 *Skinner v Stocks* (1821) 4 B & Ald 437; *Hornby v Lacy* (1817) 6 M & S 166; *Sadler v Leigh* (1815) 4 Camp 195; *Duke of Norfolk v Worthy* (1808) 1 Camp 337; *Petty v Anderson* (1825) 3 Bing 170; *Bateman v Phillips* (1812) 15 East 272; *Higgins v Senior* (1841) 8 M & W 834. As to the personal liability of the agent see PARAS 156-159.

6 *Edmunds v Bushell and Jones* (1865) LR 1 QB 97; *Watteau v Fenwick* [1893] 1 QB 346; *Boyer v Thompson* [1995] 2 AC 628, [1995] 3 All ER 135, HL (undisclosed principal liable for breach of implied condition of merchantable quality and fitness for purpose contained in the Sale of Goods Act 1979 s 14(2), (3) (see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARAS 78, 80)). In the case of an undisclosed principal there will be no apparent authority of the agent, since authority relates to a known agency situation; the agent will, however, bind the principal and the third party where he acts within the powers usually possessed by the class of person to which the principal has allowed the agent to appear to belong: *Watteau v Fenwick*. The undisclosed principal may sue even if he is bankrupt, if personal qualifications are not material: *Dyster v Randall & Sons* [1926] Ch 932, CA. A contract for insurance is an ordinary commercial contract and an undisclosed principal can sue unless the insurance company only intended to contract with the agent: *Siu Yin Kwan v Eastern Insurance Co Ltd* [1994] 2 AC 199, [1994] 1 All ER 213, PC.

7 *Humble v Hunter* (1848) 12 QB 310 (agent describing himself as 'owner' of a ship, the subject matter of a charterparty); *Formby Bros v Formby* [1910] WN 48, CA (agent describing himself as 'proprietor' in a building contract); *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847, HL; *Rederiaktiebolaget Argonaut v Hani* [1918] 2 KB 247.

8 *Fred Drughorn Ltd v Rederiaktiebolaget Trans-Atlantic* [1919] AC 203, HL (agent signing as 'charterer'), in which *Rederiaktiebolaget Argonaut v Hani* [1918] 2 KB 247, was doubted; *Danziger v Thompson* [1944] KB 654, [1944] 2 All ER 151 (agent signing as 'tenant'). See also *Murphy v Rae* [1967] NZLR 103, NZ CA (description of husband, acting for self and wife and with full authority, as 'vendor'; evidence admissible of identity of true owners, and fact that husband contracted as 'vendor' no ground for repudiation by purchaser).

9 See *Danziger v Thompson* [1944] KB 654, [1944] 2 All ER 151; and **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 186.

10 The fact that such person had constructive notice is insufficient because the doctrine of constructive notice does not extend to commercial contracts (*Manchester Trust Ltd v Furness* [1895] 2 QB 539, CA; *Greer v Downs Supply Co* [1927] 2 KB 28, CA).

11 *Said v Butt* [1920] 3 KB 497; *Greer v Downs Supply Co* [1927] 2 KB 28, CA; *Collins v Associated Greyhound Racecourses Ltd* [1930] 1 Ch 1, CA.

12 *Cundy v Lindsay* (1878) 3 App Cas 459, HL; *Greer v Downs Supply Co* [1927] 2 KB 28, CA.

13 *Ramazotti v Bowring* (1859) 7 CBNS 851; *Boulton v Jones* (1857) 2 H & N 564; *Farquharson Bros & Co v King & Co* [1902] AC 325, HL; *Greer v Downs Supply Co* [1927] 2 KB 28, CA. As to dispositions of goods by the agent see PARAS 144-149.

14 *Keighley, Maxsted & Co v Durant* [1901] AC 240, HL.

15 *Kelner v Baxter* (1866) LR 2 CP 174; *Newborne v Sensolid (Great Britain) Ltd* [1954] 1 QB 45, [1953] 1 All ER 708, CA. See further PARAS 57-70.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/6. RELATIONS BETWEEN PRINCIPAL AND THIRD PERSONS/(2) CONTRACTUAL RELATIONS/(i) Enforcement Generally/126. Where signed memorandum necessary.

## 126. Where signed memorandum necessary.

Where the enforcement of the contract depends upon the existence of a signed memorandum<sup>1</sup>, a memorandum signed by the agent is sufficient<sup>2</sup>, provided that the agent has authority, express or implied, to sign it<sup>3</sup>, and the principal is sufficiently described<sup>4</sup>.

1 As to the contracts requiring such memoranda see the Statute of Frauds (1677) s 4 (which now relates only to contracts of guarantee: see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1052 et seq); the Companies Act 1985 s 1; and the Law of Property (Miscellaneous Provisions) Act 1989 s 2 (see **SALE OF LAND** vol 42 (Reissue) PARA 29). As to the informal appointment of an agent where he will be required to sign a memorandum see PARAS 18-19. As to agents for the purchase of land see PARA 18.

2 Except where the signature of the party himself is essential, as in representations as to credit under the Statute of Frauds Amendment Act 1828 s 6: see *Williams v Mason* (1873) 28 LT 232. See also *Re Whitley Partners Ltd* (1886) 32 ChD 337, CA; and PARA 19. The signature of the agent is sufficient to revive a statute-barred debt: see the Limitation Act 1980 s 30; and **LIMITATION PERIODS** vol 68 (2008) PARA 1185. See also *Gavaghan v Edwards* [1961] 2 QB 220, [1961] 2 All ER 477, CA.

3 *Sims v Landray* [1894] 2 Ch 318; cf *Bell v Balls* [1897] 1 Ch 663; *Durrell v Evans* (1862) 1 H & C 174, Ex Ch; *Rosenbaum v Belson* [1900] 2 Ch 267; *North v Loomes* [1919] 1 Ch 378; *Thirkell v Cambi* [1919] 2 KB 590, CA; *Blackburn v Walker* (1920) 150 LT Jo 73. As to brokers' bought and sold notes see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (Reissue) PARA 45.

4 *Grainger v Moseley* (1961) 179 Estates Gazette 221. If the principal is insufficiently described, evidence will not be admissible to identify the principal, at least from other documents which are not in themselves a memorandum of the agreement: *Lovesy v Palmer* [1916] 2 Ch 233.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/6. RELATIONS BETWEEN PRINCIPAL AND THIRD PERSONS/(2) CONTRACTUAL RELATIONS/(ii) Limitations on Rights and Liabilities/127. Deed executed in name of agent.

## **(ii) Limitations on Rights and Liabilities**

### **127. Deed executed in name of agent.**

At common law, a contract by deed executed by an agent in his own name cannot be enforced by<sup>1</sup> or against<sup>2</sup> the principal, even though it is expressly stated that the agent is contracting on behalf of the principal<sup>3</sup>, but, where the agent executes a deed and is trustee for his principal of the rights conferred by the deed, the principal is entitled to enforce the contract<sup>4</sup>. The claim should be in the name of the trustee; but, if he refuses to sue, the beneficiary may do so, joining the trustee as a defendant<sup>5</sup>. By statute, any instrument executed in pursuance of a power of attorney by the donee in his own name is as effective as if executed by the donor of the power, thus entitling the donor to enforce the instrument directly<sup>6</sup>.

1 *Schack v Anthony* (1813) 1 M & S 573.

2 *Re International Contract Co, Pickering's Claim* (1871) 6 Ch App 525; *Viscount Torrington v Lowe* (1868) LR 4 CP 26.

3 *Berkeley v Hardy* (1826) 8 Dow & Ry KB 102; *Chesterfield and Midland Silkstone Colliery Co Ltd v Hawkins* (1865) 3 H & C 677. As to the execution of a conveyance under seal by a corporate agent or by an attorney for a corporation see PARA 45. As to the statutory modification of the common law rule in the case of powers of attorney see the text and note 6.

4 *Harmer v Armstrong* [1934] Ch 65, CA.

5 See *Vandepitte v Preferred Accident Insurance Corp'n of New York* [1933] AC 70, PC.

6 See the Powers of Attorney Act 1971 s 7(1); and PARA 45.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/6. RELATIONS BETWEEN PRINCIPAL AND THIRD PERSONS/(2) CONTRACTUAL RELATIONS/(ii) Limitations on Rights and Liabilities/128. Bills of exchange, etc.

### **128. Bills of exchange, etc.**

A principal is not liable upon any bill of exchange, cheque or promissory note unless his name appears thereon<sup>1</sup>, but his signature may be written by the hand of an agent<sup>2</sup>. In determining whether any signature is that of the principal, or of the agent in his personal capacity, the construction most favourable to the validity of the instrument is adopted<sup>3</sup>.

Where the agent signs the instrument in his principal's name, the principal is liable<sup>4</sup>, except in the case of a bill drawn upon the agent, in which case the principal cannot be liable as acceptor<sup>5</sup>, even if the agent accepts it in the principal's name and by his authority<sup>6</sup>.

Where the agent signs the instrument in his own name, the agent is not relieved from personal liability and the principal is not liable on the instrument<sup>7</sup> unless the agent's signature purports to be made on the principal's behalf<sup>8</sup>. In the case of a bill drawn upon the principal, however, the principal is liable, though the agent accepts in his own name<sup>9</sup>.

Where the principal carries on a trade or business in the agent's name, he is liable as acceptor<sup>10</sup> or otherwise<sup>11</sup>, as the case may be, on all instruments signed by the agent in his own name in the course of such trade or business.

1 See the Bills of Exchange Act 1882 s 23; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARAS 1467-1468.

2 See the Bills of Exchange Act 1882 ss 25, 26, 91(1); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARAS 1473-1477.

3 See the Bills of Exchange Act 1882 s 26(2); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1475.

4 See the Bills of Exchange Act 1882 ss 25, 26; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARAS 1474-1476.

5 As to acceptance see the Bills of Exchange Act 1882 s 17; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARAS 1451, 1461.

6 Cf *Polhill v Walter* (1832) 3 B & Ad 114; *Steele v M'Kinlay* (1880) 5 App Cas 754, HL.

7 Bills of Exchange Act 1882 s 26(1); *Ducarrey v Gill* (1830) Mood & M 450; *Formby Bros v Formby* [1910] WN 48, CA.

8 Bills of Exchange Act 1882 s 26(1); *Alexander v Sizer* (1869) LR 4 Exch 102.

9 *Lindus v Bradwell* (1848) 5 CB 583; *Jenkins v Morris* (1847) 16 M & W 877; *Okell v Charles* (1876) 34 LT 822, CA.

10 *Edmunds v Bushell and Jones* (1865) LR 1 QB 97.

11 *Furze v Sharwood* (1841) 2 QB 388.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/6. RELATIONS BETWEEN PRINCIPAL AND THIRD PERSONS/(2) CONTRACTUAL RELATIONS/(ii) Limitations on Rights and Liabilities/129. Contract on behalf of foreign principal.

### **129. Contract on behalf of foreign principal.**

Where a contract is made by an agent on behalf of a foreign principal there is no presumption that the agent necessarily incurs personal liability and has no authority to establish privity of contract between the principal and the third party<sup>1</sup>. Where the intention of the parties is not clear or the terms of the contract are in dispute, the fact that the principal is a foreigner is a factor to be taken into account in determining whether in the circumstances the contract is enforceable by or against the foreign principal or whether the agent is personally liable<sup>2</sup>.

1 *Teheran-Europe Co Ltd v ST Belton (Tractors) Ltd* [1968] 2 QB 545, [1968] 2 All ER 886, CA. As to an agent's personal liability see generally PARAS 156-159.

2 *HO Brandt & Co v HN Morris & Co Ltd* [1917] 2 KB 784, CA; *JS Holt and Moseley (London) Ltd v Sir Charles Cunningham & Partners* (1949) 83 Ll L Rep 141; *Anglo-African Shipping Co of New York Inc v J Mortner Ltd* [1962] 1 Lloyd's Rep 610, CA; *Maritime Stores v HP Marshall & Co* [1963] 1 Lloyd's Rep 602; *Teheran-Europe Co Ltd v ST Belton (Tractors) Ltd* [1968] 2 QB 545, [1968] 2 All ER 886, CA.



Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/6. RELATIONS BETWEEN PRINCIPAL AND THIRD PERSONS/(2) CONTRACTUAL RELATIONS/(ii) Limitations on Rights and Liabilities/130. Exclusion of principal's rights and liabilities.

### **130. Exclusion of principal's rights and liabilities.**

The rights and liabilities of a principal under his agent's contracts may be excluded by the express terms of the contract<sup>1</sup>, but in no case can the principal be deprived of his right to enforce the contract in his own name, or be exempted from his liability thereunder, notwithstanding that a usage, rule or regulation of a professional body purporting to have that effect was known to him at the time when the contract was made<sup>2</sup>. The mere fact that the agent is himself liable on the contract, and that credit has been given him<sup>3</sup>, is not sufficient to exclude the principal's liability.

1 *Montgomerie v United Kingdom Mutual Steamship Association* [1891] 1 QB 370; *United Kingdom Mutual Steamship Assurance Association v Nevill* (1887) 19 QBD 110, CA; and contrast *Great Britain 100 A1 Steamship Insurance Association v Wyllie* (1889) 22 QBD 710, CA; *Humble v Hunter* (1848) 12 QB 310; *Formby Bros v Formby* [1910] WN 48, CA; *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847, HL; *Rederiaktiebolaget Argonaut v Hani* [1918] 2 KB 247; *Collins v Associated Greyhound Racecourses Ltd* [1930] 1 Ch 1, CA; *Fred Drughorn Ltd v Rederiaktiebolaget Trans-Atlantic* [1919] AC 203, HL.

2 *Langton v Waite* (1868) LR 6 Eq 165; *Levitt v Hamblet* [1901] 2 KB 53, CA; *Allen v F O'Hearn & Co* [1937] AC 213, [1936] 3 All ER 828, PC (stock exchange usage that members act as principals).

3 *Paterson v Gandasequi* (1812) 15 East 62; *Thomson v Davenport* (1829) 9 B & C 78. As to the personal liability of the agent see generally PARAS 156-159.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/6. RELATIONS BETWEEN PRINCIPAL AND THIRD PERSONS/(2) CONTRACTUAL RELATIONS/(ii) Limitations on Rights and Liabilities/131. Election to treat agent as principal.

### **131. Election to treat agent as principal.**

Where the other contracting party, whether in ignorance of the principal's existence or not<sup>1</sup>, obtains a judgment against the agent<sup>2</sup>, or, though he knows<sup>3</sup> at the time when the contract is made<sup>4</sup>, or discovers afterwards<sup>5</sup>, who the real principal is, elects to look to the agent to the exclusion of the principal, the principal is discharged from liability to the third party and his liability cannot be revived<sup>6</sup>. Such election is conclusively proved by obtaining judgment against the agent<sup>7</sup>, even for part of the claim<sup>8</sup>, unless the part for which judgment has been obtained constitutes a separate cause of action<sup>9</sup>. Otherwise the question of election is one of fact<sup>10</sup>, and depends on the circumstances of the particular case<sup>11</sup>.

1 If the other contracting party sues the agent he will not be allowed to interrogate the agent as to the existence or identity of an undisclosed principal for the purpose of making such principal a party to the claim: *Thöl v Leask* (1855) 10 Exch 704; *Sebright v Hanbury* [1916] 2 Ch 245.

2 This applies even where the judgment is unsatisfied: *Kendall v Hamilton* (1879) 4 App Cas 504, HL. The principal's liability revives if the judgment is set aside on the merits (*Partington v Hawthorne* (1888) 52 JP 807); but not where it is merely with the agent's consent (*Cross & Co v Matthews and Wallace* (1904) 91 LT 500; *Hammond v Schofield* [1891] 1 QB 453). See also *Sullivan v Sullivan* [1912] 2 IR 116, CA; *Firm of RMKRM v Firm of MRMVL* [1926] AC 761, PC.

3 Actual knowledge must be proved in order to show an election: *Dunn v Newton* (1884) Cab & El 278.

4 *Paterson v Gandasequi* (1812) 15 East 62; *Addison v Gandassequi* (1812) 4 Taunt 574.

5 *Priestly v Fernie* (1865) 3 H & C 977.

6 *Paterson v Gandasequi* (1812) 15 East 62. The same principle applies where the principal is sued first instead of the agent: *London General Omnibus Co Ltd v Pope* (1922) 38 TLR 270. As to the common law principle of election and as to estoppel where judgment is obtained against one of two who are alternatively liable see **ESTOPPEL** vol 16(2) (Reissue) PARAS 962, 1060.

7 *Morel Bros & Co Ltd v Earl of Westmorland* [1904] AC 11, HL; *Priestly v Fernie* (1865) 3 H & C 977; *Moore v Flanagan* [1920] 1 KB 919, CA. Cf *Goldrei, Foucard & Son v Sinclair and Russian Chamber of Commerce in London* [1918] 1 KB 180, CA; but see *Ingram Clothing Manufacturing Co (Glasgow) v Lewis* 1961 SLT (Sh Ct) 18.

8 *French v Howie* [1906] 2 KB 674, CA.

9 *Debenham's Ltd v Perkins* (1925) 133 LT 252.

10 *Clarkson, Booker Ltd v Andjel* [1964] 2 QB 775, [1964] 3 All ER 260, CA; *Cyril Lord Carpet Sales v Browne* (1966) 111 Sol Jo 51, CA.

11 *Calder v Dobell* (1871) LR 6 CP 486; *Curtis v Williamson* (1874) LR 10 QB 57; *Robinson v Read* (1829) 9 B & C 449; *Stoneham and Messenger v Wyman* (1901) 17 TLR 562 174; *Ex p Pitt* (1923) 40 TLR 5, CA.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/6. RELATIONS BETWEEN PRINCIPAL AND THIRD PERSONS/(2) CONTRACTUAL RELATIONS/(iii) Settlement with Agent/132. Payments by principal.

### **(iii) Settlement with Agent**

#### **132. Payments by principal.**

Where a principal is indebted to a third person on a contract made by his agent, he is not discharged from his liability to pay the debt by any payment to or settlement by him with the agent<sup>1</sup>, unless such payment or settlement takes place bona fide and at a time when the third person is unaware of the existence of the principal and is extending credit only to the agent<sup>2</sup>, or unless the third person by his conduct leads the principal reasonably to believe that the debt has been paid by the agent<sup>3</sup> or that the third person has elected<sup>4</sup> to look to the agent alone for payment<sup>5</sup>, and the principal in consequence alters his position as regards the agent to his prejudice<sup>6</sup>. Mere delay on the part of the creditor is not, of itself, sufficient to discharge the principal<sup>7</sup>.

1 *Irvine & Co v Watson & Sons* (1880) 5 QBD 414, CA; *Davison v Donaldson* (1882) 9 QBD 623, CA; *Heald v Kenworthy* (1855) 10 Exch 739; *Smyth v Anderson* (1849) 7 CB 21.

2 *Armstrong v Stokes* (1872) LR 7 QB 598, doubted in *Irvine & Co v Watson & Sons* (1880) 5 QBD 414, CA.

3 *Wyatt v Marquis of Hertford* (1802) 3 East 147; *MacClure v Schemeil* (1871) 20 WR 168.

4 See PARA 131.

5 *Priestly v Fernie* (1865) 3 H & C 977; and cf *Harvey v Norton* (1840) 4 Jur 42.

6 *Hopkins v Ware* (1869) LR 4 Exch 268; *Smith v Ferrand* (1827) 7 B & C 19.

7 *Davison v Donaldson* (1882) 9 QBD 623, CA; *Irvine & Co v Watson & Sons* (1880) 5 QBD 414, CA; and contrast *Hopkins v Ware* (1869) LR 4 Exch 268.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/6. RELATIONS BETWEEN PRINCIPAL AND THIRD PERSONS/(2) CONTRACTUAL RELATIONS/(iii) Settlement with Agent/133. Payments by third party.

### 133. Payments by third party.

The third party is not discharged from his liability to the principal by any payment to or settlement with the agent<sup>1</sup>, unless such payment or settlement is ratified by the principal or is made in the ordinary course of business, or in accordance with the agent's authority<sup>2</sup>, express, implied or apparent<sup>3</sup>. If, however, the principal has allowed the agent to appear as principal in the transaction in respect of which the payment or settlement is made, the third person is discharged by any payment to or settlement with the agent which would have discharged him if the agent had been in fact the principal<sup>4</sup>. The third party is also entitled to set off<sup>5</sup> any debts due to him from the agent personally, provided that the payment or settlement was made or the debt incurred before the third party knew of the existence of the principal<sup>6</sup>.

1 *Crossley v Magniac* [1893] 1 Ch 594; *Linck, Moeller & Co v Jameson & Co* (1885) 2 TLR 206, CA; *Catterall v Hindle* (1867) LR 2 CP 368, Ex Ch; *Dorf v Neumann, Luebeck & Co* (1924) 40 TLR 405.

2 *Hogarth v Wherley* (1875) LR 10 CP 630; *Catterall v Hindle* (1867) LR 2 CP 368, Ex Ch; *Legge v Byas, Mosley & Co* (1901) 7 Com Cas 16. As to the agent's authority to receive payment see generally PARA 38.

3 The third party is not, in the absence of express authority, discharged by payment by a negotiable instrument (*Williams v Evans* (1866) LR 1 QB 352; *Hine Bros v Steamship Insurance Syndicate Ltd, The Netherholme, Glen Holme, and Rydal Holme* (1895) 72 LT 79, CA), unless justified by usage, such usage being a reasonable one and binding on the principal without notice (*Bridges v Garrett* (1870) LR 5 CP 451). A settlement of accounts with the agent does not bind the principal (*Pearson v Scott* (1878) 9 ChD 198), notwithstanding any usage to that effect, unless the principal has notice of it (*Sweeting v Pearce* (1861) 9 CBNS 534). As to the effect of usage see further PARA 44. See also *Boothman v Byrne* (1923) 57 ILT 36; *Bradford & Sons v Price Bros* (1923) 92 LJB 871; *Clay Hill Brick and Tile Co Ltd v Rawlings* [1938] 4 All ER 100, 159 LT 482. As to apparent authority see *Townsend v Inglis* (1816) Holt NP 278.

4 *Ramazotti v Bowring* (1859) 7 CBNS 851; *Borries v Imperial Ottoman Bank* (1873) LR 9 CP 38; *George v Clagett* (1797) 7 Term Rep 359; and see PARA 38. Similarly, where an agent is authorised to retain part of a debt paid to him for his own account, he may settle with the third party as he pleases in respect of such part: *Barker v Greenwood* (1837) 2 Y & C Ex 414.

5 *Borries v Imperial Ottoman Bank* (1873) LR 9 CP 38; *Montagu v Forwood* [1893] 2 QB 350, CA.

6 *Kaltenbach v Lewis* (1885) 10 App Cas 617, HL; *Mildred, Goyeneche & Co v Maspons Y Hermano* (1883) 8 App Cas 874, HL; *Dresser v Norwood* (1864) 17 CBNS 466, Ex Ch; *Semenza v Brinsley* (1865) 18 CBNS 467; and see *Isaac Cooke & Sons v Eshelby* (1887) 12 App Cas 271, HL.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/6. RELATIONS BETWEEN PRINCIPAL AND THIRD PERSONS/(2) CONTRACTUAL RELATIONS/(iii) Settlement with Agent/134. Purchaser from agent having lien.

### 134. Purchaser from agent having lien.

Where an agent sells in his own name goods belonging to his principal over which he has a lien against the principal, the purchaser is discharged to the extent of the value of the agent's lien by any payment to, or settlement with, or set-off against the agent<sup>1</sup>, even though the purchaser knew of the existence of the principal at the time of the contract<sup>2</sup>, or has had a demand for payment from the principal<sup>3</sup>.

1 *Hudson v Granger* (1821) 5 B & Ald 27.

2 *Warner v McKay* (1836) 1 M & W 591.

3 Or from his trustee in bankruptcy: *Drinkwater v Goodwin* (1775) 1 Cowp 251.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/6. RELATIONS BETWEEN PRINCIPAL AND THIRD PERSONS/(2) CONTRACTUAL RELATIONS/(iv) Fraud, Misrepresentation or Concealment/135. Fraud, etc, of principal or agent.

#### **(iv) Fraud, Misrepresentation or Concealment**

##### **135. Fraud, etc, of principal or agent.**

Where, in the negotiation of any contract<sup>1</sup> by an agent, the agent while acting within the scope of his authority<sup>2</sup> is guilty, whether or not the principal is privy thereto<sup>3</sup>, of fraud<sup>4</sup>, undue influence<sup>5</sup> or innocent misrepresentation<sup>6</sup>, or of concealment of essential facts which ought to be disclosed to the other contracting party<sup>7</sup>, the contract is voidable, and the other party thereto may rescind it<sup>8</sup> and recover any benefit which has passed thereunder to the principal<sup>9</sup>. If sued, the other party may successfully resist any claim brought upon the contract whether for specific performance<sup>10</sup> or otherwise<sup>11</sup>. Where the other party elects to affirm the contract or has lost the right to rescind<sup>12</sup>, he may bring a claim for deceit if the agent has induced the contract by fraud<sup>13</sup>, or sue for breach of warranty if the representation constituted a warranty<sup>14</sup>. On the other hand, where in a contract of insurance the insurer learns that an agent of the insured has acted in breach of his duty as an agent of his principal in an earlier transaction, such misconduct will not entitle the insurer to repudiate the contract; further, despite the duty *uberrimae fidei* in insurance matters, the insurer has no duty of care to warn the insured and is not liable for any misconduct of the agent towards his principal thereafter<sup>15</sup>.

If the third party has suffered loss through a misrepresentation which was not made fraudulently he may be entitled to sue for damages, and, where he would be entitled to rescind the contract for such a representation, the court may, if it considers it equitable so to do, declare the contract subsisting and award damages in lieu of rescission<sup>16</sup>.

Where a misrepresentation is made by an agent acting within his express or ostensible authority, he is not personally liable under the Misrepresentation Act 1967<sup>17</sup> to the person who has entered into the contract with the principal on the strength of the misrepresentation<sup>18</sup>. An insurance broker may be liable to his client for loss sustained through being uninsured owing to the broker's misrepresentation<sup>19</sup>.

1 The knowledge of the agent is not imputable to the principal in reference to the negotiation of another contract through another agent. Contrast *Blackburn, Low & Co v Haslam* (1888) 21 QBD 144, CA, with *Blackburn, Low & Co v Vigors* (1887) 12 App Cas 531, HL.

2 See *Overbrooke Estates Ltd v Glencombe Properties Ltd* [1974] 3 All ER 511, [1974] 1 WLR 1335, where limits were placed on the agent's ostensible authority, preventing any statement by the agent from becoming a binding representation or warranty.

3 *Biggs v Lawrence* (1789) 3 Term Rep 454. For a consideration of the position where fraud is also practised on the principal see *Kwei Tek Chao (t/a Zung Fu Co) v British Traders and Shippers Ltd* [1954] 2 QB 459, [1954] 1 All ER 779.

4 *Lloyd v Grace, Smith & Co* [1912] AC 716, HL; *Barwick v English Joint Stock Bank* (1867) LR 2 Exch 259; *S Pearson & Son Ltd v Dublin Corpn* [1907] AC 351, HL; *Mair v Rio Grande Rubber Estates Ltd* [1913] AC 853, HL.

5 *Barclays Bank plc v Kennedy and Kennedy* (1988) 58 P & CR 221, [1989] 1 FLR 356, CA.

- 6 *Mullens v Miller* (1882) 22 ChD 194. As to the right of rescission for innocent misrepresentation or to damages in lieu of rescission see the Misrepresentation Act 1967 ss 1, 2; **CONTRACT** vol 9(1) (Reissue) PARAS 767-768; **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARAS 704, 817, 834.
- 7 *Morrison v Universal Marine Insurance Co* (1873) LR 8 Exch 197; *Blackburn, Low & Co v Haslam* (1888) 21 QBD 144, CA.
- 8 *Reese River Silver Mining Co v Smith* (1869) LR 4 HL 64. As to the requirements for an effective rescission so as to prevent the acquisition of title to goods by an innocent third party see *Car and Universal Finance Co Ltd v Caldwell* [1965] 1 QB 525, [1964] 1 All ER 290, CA; and PARA 145. As to the right to rescind contracts see generally **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 812 et seq. The third party may possibly rescind where the contract is brought about by the fraud of an undisclosed principal where such fraud is unknown to the agent: see *Garnac Grain Co Inc v HMF Faure and Fairclough Ltd and Bunge Corp* [1966] 1 QB 650, [1965] 1 All ER 47n; revsd on another point [1966] 1 QB 650, [1965] 3 All ER 273, CA; affd [1968] AC 1130n, [1967] 2 All ER 353, HL.
- 9 *Refuge Assurance Co Ltd v Kettlewell* [1909] AC 243, HL; *Hughes v Liverpool Victoria Legal Friendly Society* [1916] 2 KB 482, CA.
- 10 *Mullens v Miller* (1882) 22 ChD 194.
- 11 *Blackburn, Low & Co v Haslam* (1888) 21 QBD 144, CA.
- 12 Certain bars to the right to rescind were removed by the Misrepresentation Act 1967 s 1 (see **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARAS 704, 817).
- 13 *Udell v Atherton* (1861) 7 H & N 172. As to the liability of the principal in respect of misrepresentations made by the agent see PARAS 152-153; and **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 727.
- 14 *Brown v Sheen and Richmond Car Sales Ltd* [1950] 1 All ER 1102. The court will not readily infer that a representation constitutes a warranty: *Heilbut, Symons & Co v Buckleton* [1913] AC 30, HL; and see **CONTRACT** vol 9(1) (Reissue) PARA 767 et seq. Where the third party has been induced to contract on the basis of a negligent misrepresentation for which the principal is not liable because of lack of authority of the agent, the third party may also have a separate cause of action against the agent where the third party relied on a special skill and knowledge of the agent in the making of the misrepresentation: see *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, [1963] 2 All ER 575, HL; *Dodds v Millman, Warwick, Lister and Merlin M Lister Ltd* (1964) 47 WWR 690, 45 DLR (2d) 472, BC CA. The skill or knowledge must, however, be special skill or specialist knowledge: *Jones v Still* [1965] NZLR 1071, NZ CA. As to the liability of the agent generally see PARAS 150-154 (tort liability), 160-161 (warranty of authority).
- 15 *Banque Financière de la Cité SA (formerly Banque Keyser Ullmann SA) v Westgate Insurance Co Ltd (formerly Hodge General & Mercantile Co Ltd)* [1991] 2 AC 249, [1990] 2 All ER 947, HL.
- 16 See the Misrepresentation Act 1967 s 2; **CONTRACT** vol 9(1) (Reissue) PARAS 767-768; **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 834. As to an agent's duty of care to a purchaser in respect of a negligent misstatement see *McCullagh v Lane Fox & Partners Ltd* [1996] 1 EGLR 35, [1996] 18 EG 104, CA.
- 17 See under the Misrepresentation Act 1967 s 2 (see **CONTRACT** vol 9(1) (Reissue) PARAS 767-768; **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 834).
- 18 *Resolute Maritime Inc v Nippon Kaiji Kyokai, The Skopas* [1983] 2 All ER 1, [1983] 1 WLR 857.
- 19 *Warren v Henry Sutton & Co* [1976] 2 Lloyd's Rep 276, CA.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/6. RELATIONS BETWEEN PRINCIPAL AND THIRD PERSONS/(2) CONTRACTUAL RELATIONS/(v) Admissions by Agent/136. When and how far principal bound.

## (v) Admissions by Agent

### 136. When and how far principal bound.

Where a principal gives authority to his agent to make admissions on his behalf, the principal is bound, as regards third persons, by any admission so made<sup>1</sup>, provided that the admission is within that authority<sup>2</sup>. Where, however, the agent makes any admission without, or in excess of, his authority, the principal is not bound by it<sup>3</sup>, although if the agent, at the time when he made the admission<sup>4</sup>, was acting on his principal's behalf<sup>5</sup> in the transaction to which the admission referred<sup>6</sup>, and made it in the ordinary course of his duty as such agent, the principal would be bound by the admission<sup>7</sup>.

An admission by an agent is not receivable in evidence against the principal unless made in the exercise of actual authority, express or implied<sup>8</sup>, and unless made in the course of and with reference to a transaction on behalf of the principal<sup>9</sup>. No statement made by an agent to the principal can be used against the principal by a third party as an admission<sup>10</sup>.

Where the admission made by an agent binds the principal, it binds him to the same extent as it would have done if the principal had made it himself<sup>11</sup>.

1 *Welsbach Incandescent Gas Lighting Co v New Sunlight Incandescent Co* [1900] 2 Ch 1, CA; *Williams v Innes* (1808) 1 Camp 364.

2 *Linsell v Bonsor* (1835) 2 Bing NC 241; *Meredith v Footner* (1843) 11 M & W 202; *Tustin v Arnold & Sons* (1915) 84 LJB 2214.

3 *Barnett v South London Tramways Co* (1887) 18 QBD 815, CA; *Petch v Lyon* (1846) 9 QB 147; *Young v Wright* (1807) 1 Camp 139; *Watson v King* (1846) 3 CB 608; *Blackstone v Wilson* (1857) 26 LJ Ex 229.

4 *Great Western Rly Co v Willis* (1865) 18 CBNS 748.

5 *Petch v Lyon* (1846) 9 QB 147; *Young v Wright* (1807) 1 Camp 139.

6 *Blackstone v Wilson* (1857) 26 LJ Ex 229.

7 *Kirkstall Brewery Co v Furness Rly Co* (1874) LR 9 QB 468; *Biggs v Lawrence* (1789) 3 Term Rep 454; *Richardson v Peto* (1840) 1 Man & G 896; *Edwards v Brookes (Milk) Ltd* [1963] 3 All ER 62, [1963] 1 WLR 795, DC.

8 *Wright v Pepin* [1954] 2 All ER 52, [1954] 1 WLR 635; *Re Transplanters (Holding Co) Ltd* [1958] 2 All ER 711, [1958] 1 WLR 822.

9 *Blackstone v Wilson* (1857) 26 LJ Ex 229. As to the admissibility in evidence of admissions see **CIVIL PROCEDURE** vol 11 (2009) PARAS 776-778, 819.

10 *Re Devala Provident Gold Mining Co* (1883) 22 ChD 593; *Langhorn v Allnutt* (1812) 4 Taunt 511; *Kahl v Jansen* (1812) 4 Taunt 565; *Reyner v Pearson* (1812) 4 Taunt 662; *Swan v Miller* [1919] 1 IR 151, CA. There are exceptions to this principle in Admiralty jurisdiction: see *The Solway* (1885) 10 PD 137. The principle is in any court subject to the general rules as to what can be an admission (see eg *Wiedemann v Walpole* [1891] 2 QB 534, CA (silence after an accusation does not necessarily amount to an admission)) but the rule against the admissibility of such statements may often be circumvented by means of the provisions as to the admissibility of hearsay evidence (see **CIVIL PROCEDURE**).

11 As, for instance, if in writing, in preventing the running of time (Limitation Act 1980 s 30 (see **LIMITATION PERIODS** vol 68 (2008) PARA 1185); *Anderson v Sanderson* (1817) 2 Stark 204; *Burt v Palmer* (1804) 5 Esp 145; *Gregory v Parker* (1808) 1 Camp 394; *Re Transplanters (Holding Co) Ltd* [1958] 2 All ER 711, [1958] 1 WLR 822), and similarly in cases of part payment (*Re Hale, Lilley v Foad* [1899] 2 Ch 107, CA).

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/6. RELATIONS BETWEEN PRINCIPAL AND THIRD PERSONS/(2) CONTRACTUAL RELATIONS/(vi) Notice to Agent/137. When imputed to principal.

## (vi) Notice to Agent

### 137. When imputed to principal.

Where in the course of any transaction<sup>1</sup> in which he is employed on his principal's behalf<sup>2</sup>, an agent receives notice<sup>3</sup> or acquires knowledge<sup>4</sup> of any fact material to such transaction<sup>5</sup>, under such circumstances that it is his duty to communicate it to the principal<sup>6</sup>, the principal is precluded, as regards the persons who are parties to such transaction<sup>7</sup>, from relying upon his own ignorance of that fact<sup>8</sup>, and is taken to have received notice of it from the agent<sup>9</sup> at the time when he should have received it if the agent had performed his duty with due diligence<sup>10</sup>. There is also a presumption of fact that, where an agent in a commercial transaction receives a notice intended for his principal in the ordinary course of business, he will send or hand on the notice to his principal even though he has no authority to accept the notice on his principal's behalf<sup>11</sup>.

1 Notice to purchasers is superseded in certain cases by the requirement of registration: see the Law of Property Act 1925 s 199(1)(i); and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 616. As to the doctrine of constructive notice to a purchaser of property see **EQUITY** vol 16(2) (Reissue) PARAS 580-583.

2 *Wilson v Salamandra Assurance Co of St Petersburg* (1903) 88 LT 96; *Hiern v Mill* (1806) 13 Ves 114; and contrast *Bawden v London, Edinburgh and Glasgow Assurance Co* [1892] 2 QB 534, CA, with *Biggar v Rock Life Assurance Co* [1902] 1 KB 516, and *Kelling v Pearl Assurance Co Ltd* (1923) 129 LT 573 with *Newsholme Bros v Road Transport and General Insurance Co Ltd* [1929] 2 KB 356, CA. See also *Thornton-Smith v Motor Union Insurance Co Ltd* (1913) 30 TLR 139; *Ayrey v British Legal and United Provident Assurance Co Ltd* [1918] 1 KB 136. The rule applies to sub-agents employed with the principal's consent: *Re Ashton, ex p McGowan* (1891) 64 LT 28; *Re Brewery Assets Corpn, Truman's Case* [1894] 3 Ch 272.

3 *Gladman v Johnson* (1867) 36 LJCP 153; *Tanham v Nicholson* (1872) LR 5 HL 561; *Golding v Royal London Auxiliary Insurance Co Ltd* (1914) 30 TLR 350; *Wilbraham v Colclough* [1952] 1 All ER 979.

4 *Baldwin v Casella* (1872) LR 7 Exch 325. The knowledge may have been acquired before the transaction, if it is in fact present in the agent's mind at the material time: *Fuller v Bennett* (1843) 2 Hare 394; *Rolland v Hart* (1871) 6 Ch App 678; *Bradley v Riches* (1878) 9 ChD 189. Knowledge acquired by the agent prior to the creation of the relationship of principal and agent is not in general imputable to the principal: see PARA 138.

5 *Wyllie v Pollen* (1863) 3 De GJ & Sm 596, CA.

6 *Blackburn, Low & Co v Vigors* (1887) 12 App Cas 531, HL; *Bradley v Riches* (1878) 9 ChD 189.

7 Unless they are aware of the agent's intention not to communicate it: *Sharpe v Foy* (1868) 4 Ch App 35.

8 *Bawden v London, Edinburgh and Glasgow Assurance Co* [1892] 2 QB 534, CA; *Dresser v Norwood* (1864) 17 CBNS 466; *Holdsworth v Lancashire and Yorkshire Insurance Co* (1907) 23 TLR 521; *Apthorp v Neville & Co* (1907) 23 TLR 575; *Thornton-Smith v Motor Union Insurance Co Ltd* (1913) 30 TLR 139; *Taylor v Yorkshire Insurance Co* [1913] 2 IR 1; *Golding v Royal London Auxiliary Insurance Co Ltd* (1914) 30 TLR 350; *Ayrey v British Legal and United Provident Assurance Co Ltd* [1918] 1 KB 136; *Wells v Smith* [1914] 3 KB 722; *Newsholme Bros v Road Transport and General Insurance Co Ltd* [1929] 2 KB 356, CA.

9 *Gladstone v King* (1813) 1 M & S 35.

10 As, for example, by telegram instead of by letter: *Proudfoot v Montefiore* (1867) LR 2 QB 511.

11 *Rendal, A/S v Arcos Ltd* [1937] 3 All ER 577, 106 LJB 756, HL. A car dealer may be the agent of the finance company for which he acts to receive notification of revocation of an offer from the prospective hirer: *Financings Ltd v Stimson* [1962] 3 All ER 386, [1962] 1 WLR 1184, CA. A dealer is, by statute, deemed to be the agent of the finance company to receive notice of withdrawal, cancellation or rescission: see the Consumer Credit Act 1974 ss 57, 69, 102; and **CONSUMER CREDIT** vol 9(1) (Reissue) PARAS 181, 185, 260.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/6. RELATIONS BETWEEN PRINCIPAL AND THIRD PERSONS/(2) CONTRACTUAL RELATIONS/(vi) Notice to Agent/138.  
When principal not bound.

### 138. When principal not bound.

Absent any duty to communicate the agent's knowledge to the principal, the principal is not bound by any notice given to, or any knowledge acquired by, the agent, if at the time when the agent received such notice or acquired such knowledge he was not acting as agent on the principal's behalf<sup>1</sup>, or was not so acting in respect of the transaction in which the notice or knowledge is material<sup>2</sup>.

Where the agent, though acting on his principal's behalf in some transaction in which his knowledge would otherwise be imputed to his principal, takes part in any fraud<sup>3</sup> or misfeasance<sup>4</sup> against the principal, the principal is not bound by the agent's knowledge of such fraud or misfeasance<sup>5</sup>.

1 *Société Générale de Paris v Tramways Union Co* (1884) 14 QBD 424, CA (affd sub nom *Société Générale de Paris v Walker* (1885) 11 App Cas 20, HL); *Saffron Walden Second Benefit Building Society v Rayner* (1880) 14 ChD 406, CA; *Bolckow v Fisher* (1882) 10 QBD 161, CA; *Welsbach Incandescent Gas Lighting Co v New Sunlight Incandescent Co* [1900] 2 Ch 1, CA; *Taylor v Yorkshire Insurance Co* [1913] 2 IR 1; *Wells v Smith* [1914] 3 KB 722; *Newsholme Bros v Road Transport and General Insurance Co Ltd* [1929] 2 KB 356, CA; *O'Keefe v London and Edinburgh Insurance Co* [1928] NI 85, CA; *The Hayle* [1929] P 275 (harbour master; no duty to inform shipowner of defective state of berth); *Bottomley v Harrison* [1952] 1 All ER 368, (1952) 116 JP 113, DC (secretary of landlord not agent to receive abatement notice); *Dunn v Ocean Accident and Guarantee Corp Ltd* (1933) 50 TLR 32, CA; *Stoneleigh Finance Ltd v Phillips* [1965] 2 QB 537, [1965] 1 All ER 513, CA; *Wilkinson v General Accident, Fire and Life Assurance Corp Ltd* [1967] 2 Lloyd's Rep 182. For cases on the duty or absence of duty to communicate to the principal, where the principal is a company, see *Re Fenwick, Stobart & Co, Deep Sea Fishery Co's (Ltd) Claim* [1902] 1 Ch 507 (secretary of two companies; no notice where he is under duty not to communicate to one information acquired when acting for the other); and **COMPANIES** vol 14 (2009) PARA 127.

2 *Wyllie v Pollen* (1863) 3 De GJ & Sm 596, CA; *Tate v Hyslop* (1885) 15 QBD 368, CA; *Re Holland, ex p Warren* (1885) 15 QBD 48, CA; *Cawood, Wharton & Co Ltd v Samuel Williams & Sons Ltd, The Cawood III* [1951] P 270, [1951] 1 Lloyd's Rep 350.

3 *Cave v Cave* (1880) 15 ChD 639; *Williams v Preston* (1882) 20 ChD 672. See also *Kwei Tek Chao (t/a Zung Fu Co) v British Traders and Shippers Ltd* [1954] 2 QB 459, [1954] 1 All ER 779. Aliter, if the fraud is not against the principal: *Dixon v Winch* [1900] 1 Ch 736, CA; *Boursot v Savage* (1866) LR 2 Eq 134.

4 *Re Fitzroy Bessemer Steel Co Ltd* (1884) 50 LT 144.

5 *Wells v Smith* [1914] 3 KB 722. It is not sufficient to show merely that it was to the agent's interest to withhold from his principal the knowledge which he should have communicated: *Bradley v Riches* (1878) 9 ChD 189; but see *Re David Payne & Co Ltd, Young v David Payne & Co Ltd* [1904] 2 Ch 608, CA.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/6. RELATIONS BETWEEN PRINCIPAL AND THIRD PERSONS/(2) CONTRACTUAL RELATIONS/(vii) Corruption of Agent/139. Principal's remedies.

### (vii) Corruption of Agent

#### 139. Principal's remedies.

Where a principal has entered into any contract either through the mediation of an agent<sup>1</sup>, or directly by himself on the faith of representations made by an agent<sup>2</sup>, and it afterwards appears<sup>3</sup> that the other contracting party had made to the agent<sup>4</sup> a payment or promise of payment in the nature of a bribe<sup>5</sup>, the principal has two courses open to him<sup>6</sup>. He may repudiate the contract and have it set aside<sup>7</sup>, or he may affirm it and obtain such relief as the court may think right to give him<sup>8</sup>.



There is an irrebuttable presumption that the payment was made with the intention that the agent should be influenced by it<sup>9</sup>; consequently it is immaterial to inquire whether or not the agent was in fact influenced by such payment or promise of payment to disregard his duty towards his principal<sup>10</sup>.

The rule extends to cases where the payment or promise was not made directly with reference to the particular contract, but generally with a view to influencing the agent in his dealings with the other contracting party<sup>11</sup>.

1 *Panama and South Pacific Telegraph Co v India Rubber, Gutta Percha and Telegraph Works Co* (1875) 10 Ch App 515; *Salford Corp v Lever* [1891] 1 QB 168, CA. See also *Ross River Ltd v Cambridge City Football Club Ltd* [2007] EWHC 2115 (Ch), [2007] All ER (D) 113 (Sep) (explaining *Panama and South Pacific Telegraph Co v India Rubber, Gutta Percha and Telegraph Works Co* above).

2 *Shipway v Broadwood* [1899] 1 QB 369, CA; *Re A Debtor (No 229 of 1927)* [1927] 2 Ch 367, CA.

3 *Alexander v Webber* [1922] 1 KB 642. This rule applies even where the giving or offering of a bribe to the agent first becomes known during the trial of a claim on the contract: *Shipway v Broadwood* [1899] 1 QB 369, CA; *Hough v Bolton* (1885) 1 TLR 606. The agent is required to disclose the payment to his principal: see *Ross River Ltd v Cambridge City Football Club Ltd* [2007] EWHC 2115 (Ch), [2007] All ER (D) 113 (Sep).

4 If the other contracting party discovers after his promise, but before payment, that the agent is in fact acting as agent for the principal, the payment will apparently be a bribe, but not if he does not discover it till after payment: *Grant v Gold Exploration and Development Syndicate Ltd* [1900] 1 QB 233, CA.

5 See further PARAS 93-94.

6 *Panama and South Pacific Telegraph Co v India Rubber, Gutta Percha and Telegraph Works Co* (1875) 10 Ch App 515; *Alexander v Webber* [1922] 1 KB 642.

7 As in *Shipway v Broadwood* [1899] 1 QB 369, CA; *Panama and South Pacific Telegraph Co v India Rubber, Gutta Percha and Telegraph Works Co* (1875) 10 Ch App 515; *Smith v Sorby* (1875) 3 QBD 552n; *Bartram & Sons v Lloyd* (1904) 90 LT 357, CA; *Re A Debtor (No 229 of 1927)* [1927] 2 Ch 367, CA; *Logicrose Ltd v Southend United Football Club Ltd* [1988] 1 WLR 1256. Even if a principal wrongfully repudiates the contract, being ignorant of a corrupt payment or agreement, he is entitled to relief upon discovery of the fraud: *Alexander v Webber* [1922] 1 KB 642.

8 As in *Salford Corp v Lever* [1891] 1 QB 168, CA; *Grant v Gold Exploration and Development Syndicate Ltd* [1900] 1 QB 233, CA. Relief is available against the briber of an agent: *Fyffes Group Ltd v Templeman* [2000] 2 Lloyd's Rep 643.

9 *Hovenden & Sons v Millhoff* (1900) 83 LT 41, CA; *Re A Debtor (No 229 of 1927)* [1927] 2 Ch 367, CA; *Industries and General Mortgage Co Ltd v Lewis* [1949] 2 All ER 573, [1949] WN 333. It is also presumed that the payer had a corrupt motive: see *Taylor v Walker* [1958] 1 Lloyd's Rep 490.

10 *Shipway v Broadwood* [1899] 1 QB 369, CA; *Hovenden & Sons v Millhoff* (1900) 83 LT 41, CA; and see *Harrington v Victoria Graving Dock Co* (1878) 3 QBD 549; but see *Rowland v Chapman* (1901) 17 TLR 669, where the agent's duty and interest were not in conflict.

11 *Smith v Sorby* (1875) 3 QBD 552n.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/6. RELATIONS BETWEEN PRINCIPAL AND THIRD PERSONS/(2) CONTRACTUAL RELATIONS/(vii) Corruption of Agent/140. Contract not repudiated.

#### **140. Contract not repudiated.**

Where the principal elects to affirm the contract, or does not discover the corruption of his agent until it is too late to rescind it<sup>1</sup>, he may recover from the person who has paid or promised the bribe, jointly or severally with the agent<sup>2</sup>, damages for any loss which he has

sustained by reason of entering into the contract<sup>3</sup>. The measure of damages prima facie includes the amount of the bribe, without any deduction in respect of such portion of the bribe as may already have been recovered from the agent<sup>4</sup>.

The person giving or promising any bribe to an agent is also liable to criminal proceedings<sup>5</sup>.

1 He may lose the right to rescind by acquiescing in the receipt of the bribe by his agent, provided that there is full disclosure: *Bartram & Sons v Lloyd* (1904) 90 LT 357, CA.

2 As to the position of the agent see PARA 94.

3 The claim may be framed either for money had and received (*Hovenden & Sons v Millhoff* (1900) 83 LT 41, CA), where the amount of damages is a liquidated sum, or for damages for deceit (*Grant v Gold Exploration and Development Syndicate Ltd* [1900] 1 QB 233, CA; see also *Salford Corpn v Lever* [1891] 1 QB 168, CA). The giver of the bribe cannot escape liability on the ground that he thought the agent would disclose its receipt to his principal: *Panama and South Pacific Telegraph Co v India Rubber, Gutta Percha and Telegraph Works Co* (1875) 10 Ch App 515; *Grant v Gold Exploration and Development Syndicate Ltd*; *Ross River Ltd v Cambridge City Football Club Ltd* [2007] EWHC 2115 (Ch), [2007] All ER (D) 113 (Sep).

4 *Salford Corpn v Lever* [1891] 1 QB 168, CA. An unconditional release of the agent, however, operates as a release to the third person: *Salford Corpn v Lever*.

5 He may be indicted for conspiracy (*R v De Kromme* (1892) 66 LT 301), or may be proceeded against under the Prevention of Corruption Acts 1906 and 1916 (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARAS 321, 529-530). Where the principal is a public body, proceedings may be instituted under the Public Bodies Corrupt Practices Act 1889 (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 529), or under the Prevention of Corruption Acts 1906 and 1916. As to corruption of election agents see **ELECTIONS AND REFERENDUMS** vol 15(3) (2007 Reissue) PARA 894.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/6. RELATIONS BETWEEN PRINCIPAL AND THIRD PERSONS/(3) DISPOSITIONS OF PROPERTY/(i) In general/141. Principal's right on agent's bankruptcy.

### **(3) DISPOSITIONS OF PROPERTY**

#### **(i) In general**

##### **141. Principal's right on agent's bankruptcy.**

Where the agent becomes bankrupt<sup>1</sup>, the general rule that the agent's unauthorised dispositions are not binding on the principal<sup>2</sup> applies in favour of the principal against the agent's trustee in bankruptcy and creditors, and entitles the principal to follow and recover any goods of his in the possession of the agent<sup>3</sup>, together with any debts which may be due to him in his capacity as agent of the principal<sup>4</sup>. This right of the principal is, however, subject to any lien which the agent may have in respect of the goods or debts<sup>5</sup>.

Where the agent has mixed his principal's money or property with his own, the principal has a first charge, as against the agent's trustee in bankruptcy and creditors, on the mixed fund<sup>6</sup> or property<sup>7</sup>, if still in specie, or on their proceeds<sup>8</sup>, as the case may be, provided that the money, property or proceeds can be clearly identified.

1 For the general law of bankruptcy see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 1 et seq.

2 See PARA 144.

3 *Ex p Sayers* (1800) 5 Ves 169; *Whitfield v Brand* (1847) 16 M & W 282; *Re Thickbroom, ex p Greenwood* (1862) 6 LT 558; *Giles v Perkins* (1807) 9 East 12. See also *Re Chaplin, Milne, Grenfell & Co* (1914) 59 Sol Jo 250.

4 *Scott v Surman* (1742) Willes 400; *Re Tyre and Lightfoot, ex p Pauli* (1838) 3 Deac 169; *Re Smith, ex p Bright* (1879) 10 ChD 566, CA.

5 See *Giles v Perkins* (1807) 9 East 12. As to the lien of an agent see PARAS 114-118.

6 *Hancock v Smith* (1889) 41 ChD 456, CA; *Re Hallett & Co, ex p Blane* [1894] 2 QB 237, CA; *Re Hallett's Estate, Knatchbull v Hallett* (1880) 13 ChD 696, CA; but see *Wilsons and Furness-Leyland Line Ltd v British and Continental Shipping Co Ltd* (1907) 23 TLR 397.

7 *Harris v Truman* (1882) 9 QBD 264, CA.

8 *Frith v Cartland* (1865) 2 Hem & M 417.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/6. RELATIONS BETWEEN PRINCIPAL AND THIRD PERSONS/(3) DISPOSITIONS OF PROPERTY/(i) In general/142. Misappropriation by agent.

#### **142. Misappropriation by agent.**

Where the agent has misappropriated his principal's money or property, as against the agent's trustee in bankruptcy and creditors, the principal is entitled to follow the proceeds of such money or property, and take them in their existing form, provided that it is possible to trace them<sup>1</sup>.

1 *Taylor v Plumer* (1815) 3 M & S 562. As to the extent to which money may be followed see *Banque Belge pour l'Etranger v Hambrouck* [1921] 1 KB 321, CA. As to the following of assets see further **EQUITY** vol 16(2) (Reissue) PARA 861 et seq.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/6. RELATIONS BETWEEN PRINCIPAL AND THIRD PERSONS/(3) DISPOSITIONS OF PROPERTY/(i) In general/143. Privilege from distress.

#### **143. Privilege from distress.**

Where a principal entrusts goods to an agent, the goods are not, as a general rule, privileged from distress for rent in respect of the premises on which they are at the time of the distress<sup>1</sup>.

1 *Tapling & Co v Weston* (1883) Cab & El 99, CA. As to privilege when the agent is carrying on a trade, exemptions from distress, and generally as to what may or may not be distrained for rent, see **DISTRESS** vol 13 (2007 Reissue) PARA 905 et seq.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/6. RELATIONS BETWEEN PRINCIPAL AND THIRD PERSONS/(3) DISPOSITIONS OF PROPERTY/(ii) Unauthorised Dispositions/144. Unauthorised dispositions not binding on principal.

#### **(ii) Unauthorised Dispositions**

#### 144. Unauthorised dispositions not binding on principal.

Where an agent is entrusted with any money, goods, or other property belonging to his principal, as a general rule<sup>1</sup>, no disposition of such property made by the agent without the authority of the principal is binding upon the principal<sup>2</sup>; and, notwithstanding any such disposition, the principal is entitled to follow the property into the hands of third persons and recover it<sup>3</sup> or its value<sup>4</sup>.

Where an agent is entrusted by his principal with property to be applied for the purposes of the principal, and to be accounted for on that footing, he is in a fiduciary position, and a third person taking from the agent a transfer of the property, with knowledge of a breach of duty committed, or of excess of authority exercised by him, in making the transfer, holds what has been transferred to him under a transmitted fiduciary obligation to account for it to the principal<sup>5</sup>.

1 For the exceptions to the rule see PARAS 145-149.

2 *Farquharson Bros & Co v King & Co* [1902] AC 325, HL; *Cole v North Western Bank* (1875) LR 10 CP 354, Ex Ch.

3 *Fox v Martin* (1895) 64 LJ Ch 473; *Bodenham v Hoskyns* (1852) 2 De GM & G 903; *M'Combie v Davies* (1805) 7 East 5; *Solomons v Bank of England* (1791) 13 East 135n; *Société Coloniale Anversoise v London and Brazilian Bank Ltd* [1911] 2 KB 1024 (affd on other grounds [1911] 2 KB 1031n, CA). As to the right in equity to follow assets see **EQUITY** vol 16(2) (Reissue) PARA 861 et seq.

4 *Farquharson Bros & Co v C King & Co* [1902] AC 325, HL; *Midland Bank Ltd v Reckitt* [1933] AC 1, HL.

5 *John v Dodwell & Co* [1918] AC 563, PC; *Corporation Agencies Ltd v Home Bank of Canada* [1927] AC 318, PC; *Reckitt v Barnett, Pembroke and Slater Ltd* [1929] AC 176, HL; *Reckitt v Nunburnholme* (1929) 45 TLR 629.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/6. RELATIONS BETWEEN PRINCIPAL AND THIRD PERSONS/(3) DISPOSITIONS OF PROPERTY/(ii) Unauthorised Dispositions/145. Dispositions by apparent owner.

#### 145. Dispositions by apparent owner.

Where a principal by any conduct on his part allows or enables his agent to appear as owner of any property belonging to the principal, the principal is bound by any sale, pledge<sup>1</sup> or other disposition of that property by the agent to the extent of the disposition, as regards all persons dealing for valuable consideration with the agent, provided that at the time of the disposition they had no notice of the principal's title and believed the agent to be the owner<sup>2</sup>. It is not, however, sufficient for the principal merely to have been guilty of negligence, however gross<sup>3</sup>, in the care of his property, whereby the agent obtained the opportunity of making the unauthorised disposition<sup>4</sup>. The principal must himself have done some act which was calculated to mislead, and did in fact mislead, the person dealing with the agent, or omitted some precaution against such misleading which he was bound to take<sup>5</sup>.

In the case of money<sup>6</sup> or negotiable instruments<sup>7</sup>, the principal will be bound even though the persons dealing with the agent knew him to be an agent, unless they knew, or ought to have known him<sup>8</sup> to be acting without authority<sup>9</sup> or in breach of faith<sup>10</sup>, or unless they had been put upon inquiry as to the extent of his authority<sup>11</sup>.

1 *Callow v Kelson* (1862) 10 WR 193; *M'Combie v Davies* (1805) 7 East 5; *Wood v Clydesdale Bank Ltd* 1914 SC 397, Ct of Sess.

2 *Pickering v Busk* (1812) 15 East 38; *Marshall v National Provincial Bank of England* (1892) 61 LJ Ch 465; *Eastern Distributors Ltd v Goldring (Murphy, third party)* [1957] 2 QB 600, [1957] 2 All ER 525, CA; *Lloyds and Scottish Finance Ltd v Williamson* [1965] 1 All ER 641, [1965] 1 WLR 404, CA. The rule has been applied where there is no agency, but where the true owner allows another person to appear to be the owner (see eg *Commonwealth Trust v Akotey* [1926] AC 72, PC), but will not apply where there has been no positive conduct on the part of the owner to enable that other person to appear to be the owner (see eg *Farquharson Bros & Co v C King & Co* [1902] AC 325, HL; *Jerome v Bentley & Co* [1952] 2 All ER 114, [1952] 2 TLR 58). In the case of the sale of goods, this rule operates as an exception to the general principle *nemo dat quod non habet*, and is preserved by statute: see the Sale of Goods Act 1979 s 21(1); and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 150. In other cases, the agent is regarded as having apparent authority to make the disposition and the principal as being estopped from denying the authority: see ss 21(1), 62(2); **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 9; *Eastern Distributors Ltd v Goldring (Murphy, third party)*; and PARA 25. Nothing in the Sale of Goods Act 1979 affects the provisions of the Factors Act 1889, or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner of the goods: see the Sale of Goods Act 1979 s 21(2)(a); and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 150. As to dispositions under the Factors Act 1889 see PARAS 148-149.

The giving of documents of title to the agent will enable the agent to appear as owner, but documents such as the registration document of a car (which is not a document of title: see PARA 147 note 1) will not alone give an agent sufficient authority to pass good title: *Central Newbury Car Auctions Ltd v Unity Finance Ltd (Mercury Motors, third parties)* [1957] 1 QB 371, [1956] 3 All ER 905, CA. As to dealings with documents of title see further PARA 147.

As to dispositions by sellers or buyers in possession of goods see the Factors Act 1889 ss 8, 9; the Sale of Goods Act 1979 ss 24, 25; and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARAS 157-158.

The knowledge of a dealer of a defect in title will not of itself fix a finance company purchasing from the dealer with that knowledge: *Car and Universal Finance Co Ltd v Caldwell* [1965] 1 QB 525, [1964] 1 All ER 290, CA; see further **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 154. The dealer will not generally be the agent of the finance company for this purpose: see *Car and Universal Finance Co Ltd v Caldwell*; and **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 607.

3 *Lloyds Bank Ltd v Chartered Bank of India, Australia and China* [1929] 1 KB 40, CA; but see *Fox v Martin* (1895) 64 LJ Ch 473; *Isaac Cooke & Sons v Eshelby* (1887) 12 App Cas 271, HL.

4 See *Mercantile Credit Co Ltd v Hamblin* [1965] 2 QB 242, [1964] 3 All ER 592, CA.

5 *Bank of Ireland v Evans' Charities Trustees in Ireland* (1855) 5 HL Cas 389; *Scholfield v Earl of Londesborough* [1896] AC 514, HL; *Heap v Motorists' Advisory Agency Ltd* [1923] 1 KB 577; *Morison v London County and Westminster Bank Ltd* [1914] 3 KB 356, CA; but see *Lloyds Bank Ltd v Chartered Bank of India, Australia and China* [1929] 1 KB 40, CA.

6 *Marten v Rocke, Eyton & Co* (1885) 53 LT 946; *Union Bank of Australia Ltd v Murray-Aynsley* [1898] AC 693, PC.

7 *London Joint Stock Bank v Simmons* [1892] AC 201, HL; *Goodwin v Robarts* (1876) 1 App Cas 476, HL; *Rumball v Metropolitan Bank* (1877) 2 QBD 194; *Jameson v Union Bank of Scotland* (1913) 109 LT 850; *Lloyds Bank Ltd v Chartered Bank of India, Australia and China* [1929] 1 KB 40, CA.

8 *Lloyds Bank Ltd v Chartered Bank of India, Australia and China* [1929] 1 KB 40, CA; *Reckitt v Barnett, Pembroke and Slater Ltd* [1929] AC 176, HL.

9 *Earl of Sheffield v London Joint Stock Bank* (1888) 13 App Cas 333, HL.

10 *Bodenham v Hoskyns* (1852) 2 De GM & G 903; and cf *Shields v Governor of Bank of Ireland* [1901] 1 IR 222; *Bank of New South Wales v Goulburn Valley Butter Co Pty Ltd* [1902] AC 543, PC; *Lloyds Bank Ltd v Swiss Bankverein, Union of London and Smiths Bank Ltd v Swiss Bankverein* (1913) 108 LT 143, CA; *Paine v Bevan and Bevan* [1914] WN 147, CA; *Fuller v Glyn, Mills, Currie & Co* [1914] 2 KB 168.

11 *AL Underwood Ltd v Bank of Liverpool and Martins* [1924] 1 KB 775, CA; *B Liggett (Liverpool) v Barclays Bank Ltd* [1928] 1 KB 48.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/6. RELATIONS BETWEEN PRINCIPAL AND THIRD PERSONS/(3) DISPOSITIONS OF PROPERTY/(ii) Unauthorised Dispositions/146. Uncompleted negotiable instruments.

## 146. Uncompleted negotiable instruments.

If a principal signs a piece of paper and hands it to his agent with the intention that it be converted into a negotiable instrument, the principal will be estopped, as against a bona fide purchaser for value without notice, from showing any limitation upon the authority of his agent which is not obvious upon the face of the instrument<sup>1</sup>. A principal is not, however, estopped from relying upon a limitation of the agent's authority where the uncompleted instrument has been handed to the agent for safe custody<sup>2</sup>.

1 *Lloyds Bank Ltd v Cooke* [1907] 1 KB 794, CA; contrast *Wilson and Meeson v Pickering* [1946] KB 422, [1946] 1 All ER 394, CA (cheque marked 'not negotiable').

2 *Smith v Prosser* [1907] 2 KB 735, CA. As to the general liability of a principal under bills of exchange see PARA 128.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/6. RELATIONS BETWEEN PRINCIPAL AND THIRD PERSONS/(3) DISPOSITIONS OF PROPERTY/(ii) Unauthorised Dispositions/147. Documents of title.

## 147. Documents of title.

Where a principal entrusts his agent with documents of title<sup>1</sup>, and gives him authority to raise a loan by means of them, he is bound, as regards any person who has dealt with the agent in good faith, by any security given by the agent to the full amount advanced by that person to the agent on the faith of the security, notwithstanding the fact that the agent exceeded his authority in borrowing such amount<sup>2</sup>.

No disposition which depends for its validity upon a forged instrument is, however, binding upon the principal<sup>3</sup>.

1 Documents of title do not include the registration document of a car, although such documents are frequently used by sellers as evidence of title: see *Central Newbury Car Auctions Ltd v Unity Finance Ltd (Mercury Motors, third parties)* [1957] 1 QB 371, [1956] 3 All ER 905, CA (a case concerning a registration book, the predecessor of a vehicle registration document). As to dispositions by apparent owners of goods together with documents evidencing title see PARA 145.

2 *Brocklesby v Temperance Permanent Building Society* [1895] AC 173, HL; *Robinson v Montgomeryshire Brewery Co* [1896] 2 Ch 841; *Gordon v James* (1885) 30 ChD 249, CA; *Rimmer v Webster* [1902] 2 Ch 163; *France v Clark* (1884) 26 ChD 257, CA; *Hambro v Burnand* [1904] 2 KB 10, CA; *Cuthbert v Robarts, Lubbock & Co* [1909] 2 Ch 226, CA; *Fry and Mason v Smellie and Taylor* [1912] 3 KB 282, CA. The owner of shares in a ship does not hold out another as his agent merely by transferring the shares to him so that they stand in his name: *Burgis v Constantine* [1908] 2 KB 484, CA.

3 *Mayor, etc of Merchants of Staple of England v Bank of England* (1887) 21 QBD 160, CA; *Bank of Ireland v Evans' Charities Trustees in Ireland* (1855) 5 HL Cas 389; *Painter v Abel* (1863) 2 H & C 113. See also *Morison v London County and Westminster Bank Ltd* [1914] 3 KB 356, CA. There may be a duty to prevent forgery: see *London Joint Stock Bank Ltd v MacMillan and Arthur* [1918] AC 777, HL. See also PARA 59.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/6. RELATIONS BETWEEN PRINCIPAL AND THIRD PERSONS/(3) DISPOSITIONS OF PROPERTY/(ii) Unauthorised Dispositions/148. Dispositions under the Factors Act 1889.

## 148. Dispositions under the Factors Act 1889.

Where a mercantile agent<sup>1</sup> is with the consent<sup>2</sup> of the owner<sup>3</sup> (that is his principal) in possession<sup>4</sup> (when acting in the capacity of a mercantile agent<sup>5</sup>) of goods<sup>6</sup> or of the documents of title<sup>7</sup> to goods, the owner is bound by any sale, pledge<sup>8</sup> or other disposition<sup>9</sup> of the goods made by the agent<sup>10</sup> for valuable consideration<sup>11</sup> when acting in the ordinary course of business<sup>12</sup> of a mercantile agent<sup>13</sup>. The owner is bound notwithstanding that the transaction is one which by custom of the trade the agent has no implied authority to carry out<sup>14</sup>. In all such cases, the person taking under the disposition must act in good faith, and have no notice at the time of the disposition that the agent had no authority to make it, otherwise the principal is not bound<sup>15</sup>. The onus of proving that he acted in good faith and without notice of the agent's want of authority is upon the person taking under the disposition<sup>16</sup>.

If the agent has been in possession with his principal's consent, the determination of the consent is immaterial unless the person taking under the disposition had notice of the determination at the time of the disposition<sup>17</sup>, and the consent of the principal is presumed in the absence of evidence to the contrary<sup>18</sup>.

1 As to the meaning of 'mercantile agent' see PARA 12.

2 The agent can give a good title even if the consent was obtained by fraud (*Whitehorn Bros v Davison* [1911] 1 KB 463, CA; *Pearson v Rose and Young Ltd* [1951] 1 KB 275, [1950] 2 All ER 1027, CA), unless the owner did not intend the agent to have possession at all (*Stadium Finance Ltd v Robbins* [1962] 2 QB 664, [1962] 2 All ER 633, CA). Illegality may preclude consent being proved: see *Belvoir Finance Co Ltd v Harold G Cole & Co Ltd* [1969] 2 All ER 904, [1969] 1 WLR 1877.

3 The owner is the person who can give express authority with regard to dealing with the goods or documents of title: *Lloyds Bank Ltd v Bank of America National Trust and Savings Association* [1938] 2 KB 147, [1938] 2 All ER 63 at 70, CA.

4 The agent is in possession when the goods or documents are in his actual custody or are held by any other person subject to his control, or for him, or on his behalf: Factors Act 1889 s 1(2).

5 He must be acting in relation to the goods in his possession: *Lowther v Harris* [1927] 1 KB 393; *Staffs Motor Guarantee Ltd v British Wagon Co Ltd* [1934] 2 KB 305; *Pearson v Rose and Young Ltd* [1951] 1 KB 275, [1950] 2 All ER 1027, CA; *Stadium Finance Ltd v Robbins* [1962] 2 QB 664, [1962] 2 All ER 633, CA; *Astley Industrial Trust Ltd v Miller* [1968] 2 All ER 36; *Belvoir Finance Co Ltd v Harold G Cole & Co Ltd* [1969] 2 All ER 904, [1969] 1 WLR 1877.

6 It was suggested in *Pearson v Rose and Young Ltd* [1951] 1 KB 275, [1950] 2 All ER 1027, CA, that a person who obtained possession of a car with consent but of the registration book without consent was not in possession of the 'goods'. The reasoning was rejected in *Stadium Finance Ltd v Robbins* [1962] 2 QB 664, [1962] 2 All ER 633, CA; it was held, however, in that case that the sale of a car without an ignition key or registration book was not in the ordinary course of business of a mercantile agent.

7 'Documents of title' include any bill of lading, dock warrant, warehouse-keeper's certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by indorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented: Factors Act 1889 s 1(4). If the agent obtains possession of any documents of title by reason of being or having been, with the consent of his principal, in possession of goods or other documents of title, his possession of the first-mentioned documents of title is deemed to be with the consent of the principal: s 2(3).

A delivery order may be a valid document of title even though it does not relate to specific goods: *Ant Jurgens Margarinefabrieken v Louis Dreyfus & Co* [1914] 3 KB 40.

A motor vehicle registration document is not a document of title: *Joblin v Watkins and Roseveare (Motors) Ltd* [1949] 1 All ER 47, 64 TLR 464; *Bishopsgate Motor Finance Corp Ltd v Transport Brakes Ltd* [1949] 1 KB 322, [1949] 1 All ER 37, CA; *Central Newbury Car Auctions Ltd v Unity Finance Ltd (Mercury Motors, third parties)* [1957] 1 QB 371, [1956] 3 All ER 905, CA.

8 'Pledge' includes any contract pledging, or giving a lien or security on, goods, whether in consideration of an original advance, or of any further or continuing advance, or of any pecuniary liability: Factors Act 1889 s

1(5). A pledge of the documents of title to goods is deemed to be a pledge of the goods: s 3. See *Dublin City Distillery Ltd v Doherty* [1914] AC 823, HL.

9 Handing goods for sale to an auctioneer who advances money upon them is not a 'sale, pledge, or other disposition': *Waddington & Sons v Neale & Sons* (1907) 96 LT 786.

10 Or by his clerk or other person authorised in the ordinary course of business: Factors Act 1889 s 6. The Act does not, however, protect dispositions by persons who are not mercantile agents within its meaning: *Lamb v Attenborough* (1862) 1 B & S 831; *Wood v Rowcliffe* (1846) 6 Hare 183.

11 In general the consideration necessary to validate a disposition by a mercantile agent may be either a payment in cash, or the delivery or transfer of other goods or of a document of title to goods or of a negotiable security, or any other valuable consideration: Factors Act 1889 s 5.

12 The agent must not only be in possession as a mercantile agent but also act in the ordinary course of business as one: *Oppenheimer v Attenborough & Son* [1908] 1 KB 221, CA (outside business hours and outside business premises; see also *Heap v Motorists' Advisory Agency Ltd* [1923] 1 KB 577; *Pearson v Rose and Young Ltd* [1951] 1 KB 275, [1950] 2 All ER 1027, CA; *Stadium Finance Ltd v Robbins* [1962] 2 QB 664, [1962] 2 All ER 633, CA). Title to goods will also pass where the seller is a buyer in possession of the goods, if the sale is one which would be in the ordinary course of business of a mercantile agent if the seller had been such an agent: see the Factors Act 1889 s 9; *Newtons of Wembley Ltd v Williams* [1965] 1 QB 560, [1964] 3 All ER 532, CA; and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 158.

13 Factors Act 1889 s 2(1).

14 A pledge by a diamond broker entrusted with diamonds has been held valid, although it is contrary to the custom of the diamond trade for brokers to have implied authority to pledge: *Oppenheimer v Attenborough & Son* [1908] 1 KB 221, CA; *Janesich v George Attenborough & Son* (1910) 102 LT 605.

15 See the Factors Act 1889 s 2(1); and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 158.

16 *Heap v Motorists' Advisory Agency Ltd* [1923] 1 KB 577.

17 Factors Act 1889 s 2(2); see *Moody v Pall Mall Deposit and Forwarding Co Ltd* (1917) 33 TLR 306.

18 Factors Act 1889 s 2(4); see *Pearson v Rose and Young Ltd* [1951] 1 KB 275, [1950] 2 All ER 1027, CA; *Stadium Finance Ltd v Robbins* [1962] 2 QB 664, [1962] 2 All ER 633, CA.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/6. RELATIONS BETWEEN PRINCIPAL AND THIRD PERSONS/(3) DISPOSITIONS OF PROPERTY/(ii) Unauthorised Dispositions/149. Rights acquired by pledgee.

### 149. Rights acquired by pledgee.

In the case of a pledge of goods by a mercantile agent<sup>1</sup>, the pledgee acquires a right to hold the goods against the principal for the full value of the consideration if the advance has been made in cash<sup>2</sup>. If the goods are pledged to secure a debt due from the agent to the pledgee before the time of the pledge, the pledgee acquires no right to the goods beyond that which could have been enforced by the agent at the time of the pledge<sup>3</sup>. Where, however, the goods are pledged in exchange for other goods, documents of title or negotiable securities, the pledgee acquires no right or interest in the goods so pledged in excess of the value of the other goods, documents of title or negotiable securities at the time of the exchange<sup>4</sup>.

1 As to the meaning of 'mercantile agent' see PARA 12. As to pledges see also PARA 148 note 8.

2 See the Factors Act 1889 s 5; and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARAS 158, 160.

3 Factors Act 1889 s 4.



4 See the Factors Act 1889 s 5; and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARAS 158, 160.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/6. RELATIONS BETWEEN PRINCIPAL AND THIRD PERSONS/(4) TORT LIABILITY/150. Act expressly authorised.

## **(4) TORT LIABILITY**

### **150. Act expressly authorised.**

Where a principal gives his agent express authority to do a particular act which is wrongful in itself<sup>1</sup>, or which necessarily results in a wrongful act<sup>2</sup>, the principal is responsible, jointly and severally with the agent<sup>3</sup>, to third persons for any loss or damage occasioned thereby.

1 *Schuster v McKellar* (1857) 7 E & B 704; *Parkes v Prescott* (1869) LR 4 Exch 169.

2 *Glynn v Houston* (1841) 2 Man & G 337.

3 As to the effect of joint liability and the rights of the principal and agent inter se see PARA 151.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/6. RELATIONS BETWEEN PRINCIPAL AND THIRD PERSONS/(4) TORT LIABILITY/151. Act not expressly authorised.

### **151. Act not expressly authorised.**

Where the act complained of is not expressly authorised by the principal, the principal is, while the agent is acting within the scope of his implied authority or within the scope of his apparent or ostensible authority<sup>1</sup>, jointly and severally responsible with the agent<sup>2</sup>, however improper<sup>3</sup> or imperfect<sup>4</sup> the manner in which the authority is carried out. It is immaterial that actual malice is an essential ingredient of the wrongful act<sup>5</sup>, that the wrongful act is also a crime<sup>6</sup>, or that the act in question has been expressly prohibited by the principal<sup>7</sup>.

Where the act done by the agent falls entirely outside the scope of his authority, the principal will not be responsible<sup>8</sup>.

The rights of the injured party against the principal and agent as joint tortfeasors and their rights and liabilities inter se are now governed by statute<sup>9</sup>.

1 *Uxbridge Permanent Benefit Building Society v Pickard* [1939] 2 KB 248, [1939] 2 All ER 344, CA; *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716, [1965] 2 All ER 725, CA. See also *Abraham v Bullock* (1902) 86 LT 796, CA; *Lloyd v Grace, Smith & Co* [1912] AC 716, HL; *United Africa Co Ltd v Saka Owoade* [1955] AC 130, [1957] 3 All ER 216, PC; *Kooragang Investments Pty Ltd v Richardson & Wrench Ltd* [1982] AC 462, [1981] 3 All ER 65, PC. In many cases the courts have not found it necessary to decide whether the person committing the tort was an agent or an employee under a contract of service, and have used the terminology of either relationship interchangeably; in such cases the 'scope of authority' of an agent will be much the same as the 'course of employment' of an employee: see eg *Lloyd v Grace, Smith & Co*; and for a consideration of the liability of an employer see generally *Morris v CW Martin & Sons Ltd*; and **EMPLOYMENT** vol 39 (2009) PARA 123 et seq.

2 The agent will not, however, be liable personally if the act arises out of negligence of the principal: *WB Anderson & Sons Ltd v Rhodes (Liverpool) Ltd* [1967] 2 All ER 850. As to the rights of the principal and agent inter se see the text and note 9; and as to the personal liability of the agent to the third party see PARAS 164-165.

3 The following are examples of particular torts, but the list should not be taken to be exhaustive:

- 14 (1) assault: *Smith v North Metropolitan Tramways Co* (1891) 7 TLR 459, CA; *Bayley v Manchester, Sheffield and Lincolnshire Rly Co* (1873) LR 8 CP 148; *Hutchins v LCC* (1915) 85 LJB 1177; *Whittaker v LCC* [1915] 2 KB 676;
- 15 (2) conversion: *Giles v Taff Vale Rly Co* (1853) 2 E & B 822, Ex Ch; *Ewbank v Nutting* (1849) 7 CB 797; *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716, [1965] 2 All ER 725, CA;
- 16 (3) false imprisonment: *Moore v Metropolitan Rly Co* (1872) LR 8 QB 36; *Poulton v London and South Western Rly Co* (1867) LR 2 QB 534; *Percy v Glasgow Corp* [1922] 2 AC 299; *Lambert v Great Eastern Rly Co* [1909] 2 KB 776, CA; *Fisher v Oldham Corp* [1930] 2 KB 364; as to giving into custody see PARA 39;
- 17 (4) fraud: *Udell v Atherton* (1861) 7 H & N 172; *British Mutual Bank Co Ltd v Charnwood Forest Rly Co* (1887) 18 QBD 714, CA; *Lloyd v Grace, Smith & Co* [1912] AC 716, HL; cf *Terrill v Parker and Thomas* (1915) 32 TLR 48; see also *Russo-Chinese Bank v Li Yau Sam* [1910] AC 174, PC; *Uxbridge Permanent Benefit Building Society v Pickard* [1939] 2 KB 248, [1939] 2 All ER 344, CA (solicitor liable for clerk's fraud although person defrauded not a client); *British Railway Traffic and Electric Co Ltd v Roper* (1939) 162 LT 217 (fraudulent completion of hire purchase forms by dealer on behalf of intending hirer); *Briess v Woolley* [1954] AC 333, [1954] 1 All ER 909, HL;
- 18 (5) infringement of copyright: *Monaghan v Taylor* (1866) 2 TLR 685;
- 19 (6) infringement of patent: *Betts v De Vitre* (1868) 3 Ch App 429, varied sub nom *Nielson v Betts* (1871) LR 5 HL 1;
- 20 (7) negligence: *Thelma (Owners) v University College School* [1953] 2 Lloyd's Rep 613, where a pupil acting as cox for a school eight was held to be the school's agent and the governors were liable for his negligence;
- 21 (8) negligence on highway: *Whatman v Pearson* (1868) LR 3 CP 422; *Engelhart v Farrant & Co* [1897] 1 QB 240, CA; *Aitchison v Page Motors Ltd* (1935) 154 LT 128; *Ormrod v Crosville Motor Services Ltd* [1953] 2 All ER 753, [1953] 1 WLR 1120, CA; *Scarsbrook v Mason* [1961] 3 All ER 767, 105 Sol Jo 889; *Klein v Caluori* [1971] 2 All ER 701, [1971] 1 WLR 619; *Nottingham v Aldridge* [1971] 2 QB 739, [1971] 2 All ER 751; see also *Morgans v Launbury* [1973] AC 127, [1972] 2 All ER 606, HL (where driver in question held not to be an agent of the owner);
- 22 (9) nuisance to highway: *Whiteley v Pepper* (1877) 2 QBD 276;
- 23 (10) slander: *Ormiston v Great Western Rly Co* [1917] 1 KB 598;
- 24 (11) threats causing nervous shock: *Janvier v Sweeney* [1919] 2 KB 316, CA;
- 25 (12) trespass: *Gregory v Piper* (1829) 9 B & C 591; *Stewart v Adams* 1920 SC 129, Ct of Sess;
- 26 (13) wrongful distress: *Hatch v Hale* (1850) 15 QB 10; *Richards v West Middlesex Waterworks Co* (1885) 15 QBD 660;
- 27 (14) wrongful execution: *Smith v Keal* (1882) 9 QBD 340, CA; *Morris v Salberg* (1889) 22 QBD 614, CA; and see *Clissold v Cratchley* [1910] 2 KB 244, CA.

4 Cf *Whatman v Pearson* (1868) LR 3 CP 422, with *Storey v Ashton* (1869) LR 4 QB 476; *Engelhart v Farrant & Co* [1897] 1 QB 240, CA, with *Beard v London General Omnibus Co* [1900] 2 QB 530, CA.

5 *Cornford v Carlton Bank* [1900] 1 QB 22, CA; *Citizens' Life Assurance Co v Brown* [1904] AC 423, PC; *Aiken v Caledonian Rly Co* 1913 SC 66, Ct of Sess. This does not apply where malice must be proved in order to defeat a plea of privilege: *Egger v Viscount Chelmsford* [1965] 1 QB 248, [1964] 3 All ER 406, CA.

6 *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716, [1965] 2 All ER 725, CA; *Osborn v Gillett* (1873) LR 8 Exch 88. This is so even if the agent has been convicted: *Dyer v Munday* [1895] 1 QB 742, CA. A forgery, like any other fraudulent act, if within the ostensible scope of the agent's authority, imposes liability on the principal: *Uxbridge Permanent Benefit Building Society v Pickard* [1939] 2 KB 248, [1939] 2 All ER 344, CA, disagreeing with statements in *Slingsby v District Bank Ltd* [1932] 1 KB 544, CA.

7 *Limpus v London General Omnibus Co Ltd* (1862) 1 H & C 526; *Gregory v Piper* (1829) 9 B & C 591; *Lloyd v Grace, Smith & Co* [1912] AC 716, HL; *Warrington v Windhill Industrial Co-operative Society* (1918) 88 LJB 280.

8 *Sanderson v Collins* [1904] 1 KB 628, CA; *Poulton v London and South Western Rly Co* (1867) LR 2 QB 534; *Whatman v Pearson* (1868) LR 3 CP 422; *Engelhart v Farrant & Co* [1897] 1 QB 240, CA; *Rand v Craig* [1919] 1 Ch 1, CA; *Warren v Henlys Ltd* [1948] 2 All ER 935, 92 Sol Jo 706 (assault).

9 See the Civil Liability (Contribution) Act 1978 (especially s 1); the Law Reform (Husband and Wife) Act 1962 s 1; **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 211; **TORT** vol 45(2) (Reissue) PARA 346 et seq.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/6. RELATIONS BETWEEN PRINCIPAL AND THIRD PERSONS/(4) TORT LIABILITY/152. Fraudulent misrepresentation.

## 152. Fraudulent misrepresentation.

Where an agent is personally guilty of fraudulent misrepresentation<sup>1</sup> and has actual or apparent authority to make the representation, the principal is responsible as for any other tort, and a claim of deceit lies against him<sup>2</sup>. It is irrelevant that the fraudulent misrepresentation was made before the agent's authority was granted if the misrepresentation is not corrected before the third party acts upon it<sup>3</sup>. Where the agent makes a representation which he honestly believes to be true, but which the principal knows to be false, the principal is responsible for fraudulent misrepresentation if there was actual fraud or dishonesty on his part<sup>4</sup>, as where he employs the agent in order that the misrepresentation might be made<sup>5</sup>. If, however, there is no actual fraud or dishonesty on the part of the principal, he will not be liable on a claim for deceit if the agent made the representation innocently without the knowledge of the principal, although the principal knew the facts which rendered the representation false<sup>6</sup>.

1 As to the effect of such misrepresentation upon contracts made by the agent see PARA 135.

2 *Barwick v English Joint Stock Bank* (1867) LR 2 Exch 259; *Lloyd v Grace, Smith & Co* [1912] AC 716, HL; *Byrne v Rudd* [1920] 2 IR 12, CA. Cf *Armagas Ltd v Mundogas SA, The Ocean Frost* [1986] AC 717, [1986] 2 All ER 385, [1986] 2 Lloyd's Rep 109, HL. This does not apply where the fraud is primarily practised on the principal: *Kwei Tek Chao (t/a Zung Fu Co) v British Traders and Shippers Ltd* [1954] 2 QB 459, [1954] 1 All ER 779. As to the requirement of writing where the fraudulent misrepresentation is as to character or credit see PARA 154. As to the liability of the agent to the third party see PARAS 160-161 (warranty of authority), 164-165 (tort liability). As to the liability of the principal where the third party has relied on a particular skill of the agent see eg *Bango v Holt (AE Austin & Co Ltd, third parties)* [1971] 5 WWR 522, 21 DLR (3d) 66, BC SC.

3 *Briess v Woolley* [1954] AC 333, [1954] 1 All ER 909, HL.

4 *Armstrong v Strain* [1952] 1 KB 232, [1952] 1 All ER 139, CA; see also *Cornfoot v Fowke* (1840) 6 M & W 358; *National Exchange Co of Glasgow v Drew* (1855) 2 Macq 103, HL; *Ludgater v Love* (1881) 44 LT 694, CA; *Gordon Hill Trust Ltd v Segall* [1941] 2 All ER 379, 85 Sol Jo 191, CA; *London County Freehold and Leasehold Properties Ltd v Berkeley Property and Investment Co Ltd* [1936] 2 All ER 1039, 155 LT 190, CA; *Anglo-Scottish Beet Sugar Corp Ltd v Spalding UDC* [1937] 2 KB 607, [1937] 3 All ER 335; *Turvey v Dentons (1923) Ltd* [1953] 1 QB 218, [1952] 2 All ER 1025.

5 *Ludgater v Love* (1881) 44 LT 694, CA. See also *Garnac Grain Co Inc v HMF Faure and Fairclough Ltd and Bunge Corp* [1966] 1 QB 650, [1965] 1 All ER 47n (revsd on another point [1966] 1 QB 650, [1965] 3 All ER 273, CA; affd [1968] AC 1130n, [1967] 2 All ER 353, HL); *Gosling v Anderson* (1972) 122 NLJ 152, CA. As to rescission of contracts in addition to damages for misrepresentation see further PARA 135.

6 See *Armstrong v Strain* [1952] 1 KB 232, [1952] 1 All ER 139, CA, where *S Pearson & Son Ltd v Dublin Corp* [1907] AC 351, HL, and *Anglo-Scottish Beet Sugar Corp Ltd v Spalding UDC* [1937] 2 KB 607, [1937] 3 All ER 335, are discussed.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/6. RELATIONS BETWEEN PRINCIPAL AND THIRD PERSONS/(4) TORT LIABILITY/153. Negligent misrepresentation.

### 153. Negligent misrepresentation.

The principal may be vicariously liable in negligence for the negligent misrepresentation of the agent and also liable in respect of the supply of false information to the agent which results in misrepresentation by the agent to persons to whom the principal owes a duty of care<sup>1</sup>.

<sup>1</sup> *WB Anderson & Sons Ltd v Rhodes (Liverpool) Ltd* [1967] 2 All ER 850. See also *Hedley Byrne & Co Ltd v Heller & Partners* [1964] AC 465, [1963] 2 All ER 575, HL; the Misrepresentation Act 1967 s 2; **CONTRACT** vol 9(1) (Reissue) PARAS 767-768; **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 834. There is no reason in principle why the professional agent of an employer cannot become liable to a contractor for negligent misstatements made to induce him to tender if the contractor relies on those statements: *J Jarvis and Sons Ltd v Castle Wharf Developments Ltd* [2001] EWCA Civ 19, [2001] All ER (D) 108 (Jan).

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/6. RELATIONS BETWEEN PRINCIPAL AND THIRD PERSONS/(4) TORT LIABILITY/154. Representation as to credit.

### 154. Representation as to credit.

The principal is not liable on a claim for deceit<sup>1</sup> for any representation as to the character or credit<sup>2</sup> of another person made by his agent, unless such representation is in writing signed by the principal himself<sup>3</sup>. A signature by the agent is not sufficient<sup>4</sup>, even though expressly authorised or adopted by the principal<sup>5</sup>.

<sup>1</sup> The Statute of Frauds Amendment Act 1828 (see note 3) applies only to actions for deceit: see *Banbury v Bank of Montreal* [1918] AC 626, HL; *WB Anderson & Sons Ltd v Rhodes (Liverpool) Ltd* [1967] 2 All ER 850. As to liability in negligence see PARA 153.

<sup>2</sup> As to the meaning of 'representation as to credit' see *Bishop v Balkis Consolidated Co* (1890) 25 QBD 512, CA. See also *Banbury v Bank of Montreal* [1918] AC 626, HL.

<sup>3</sup> See the Statute of Frauds Amendment Act 1828 s 6; *Swift v Jewsbury and Goddard* (1874) LR 9 QB 301, Ex Ch.

<sup>4</sup> This applies even though the principal is a corporation: *Hirst v West Riding Union Banking Co Ltd* [1901] 2 KB 560, CA.

<sup>5</sup> *Williams v Mason* (1873) 28 LT 232.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/6. RELATIONS BETWEEN PRINCIPAL AND THIRD PERSONS/(5) CRIMINAL LIABILITY/155. Criminal liability.

## (5) CRIMINAL LIABILITY

### 155. Criminal liability.

As a general rule, no act or default on the part of an agent imposes any criminal liability on the principal in respect thereof, unless the principal himself takes part in, authorises, or connives at the commission of such act or default<sup>1</sup>.

The general rule is, however, subject to two exceptions. First, the principal may be criminally liable at common law for a public nuisance<sup>2</sup> committed by him through the instrumentality of his agent<sup>3</sup>. Secondly, a particular statute may, by its express terms or by implication, impose a

criminal liability upon the principal in respect of the acts or defaults of his agent by imposing a liability which can exist without proof of any criminal intent<sup>4</sup>.

These exceptions do not apply where negligence is an essential ingredient in the offence; in this case the principal is not criminally responsible for the negligence of his agent<sup>5</sup>.

1 *R v Stephens* (1866) LR 1 QB 702; *Hardcastle v Bielby* [1892] 1 QB 709.

2 Such proceedings, though criminal in form, are civil in substance: *R v Stephens* (1866) LR 1 QB 702.

3 *R v Stephens* (1866) LR 1 QB 702; but see *Chisholm v Doulton* (1889) 22 QBD 736. Cf *Barnes v Akroyd* (1872) LR 7 QB 474.

4 *Sykes v Millington* [1953] 1 QB 770, [1953] 1 All ER 1098, DC; *Hardcastle v Bielby* [1892] 1 QB 709; *Pearks, Gunston and Tee Ltd v Ward, Hennen v Southern Counties Dairies Co Ltd* [1902] 2 KB 1; *Mousell Bros Ltd v London and North-Western Ry Co* [1917] 2 KB 836, DC; *Quality Dairies (York) Ltd v Pedley* [1952] 1 KB 275, [1952] 1 All ER 380, DC (regulations under the Food and Drugs Acts (now the Food Safety Act 1990)).

5 *Chisholm v Doulton* (1889) 22 QBD 736.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/7. RELATIONS BETWEEN AGENT AND THIRD PERSONS/(1) LIABILITIES OF AGENT/(i) On Contracts/156. Fact of agency not disclosed.

## 7. RELATIONS BETWEEN AGENT AND THIRD PERSONS

### (1) LIABILITIES OF AGENT

#### (i) On Contracts

##### 156. Fact of agency not disclosed.

Where a person makes a contract in his own name without disclosing either the name or the existence of a principal, he is personally liable on the contract to the other contracting party, though he may be in fact acting on a principal's behalf<sup>1</sup>. He will continue to be liable even after the discovery of the agency by the other party, unless and until there has been an unequivocal election by the other contracting party to look to the principal alone<sup>2</sup>. The agent will also be liable where he holds himself out as agent for a named person, but is in fact acting as agent for an unnamed person<sup>3</sup>. Where the contract is not written but oral, the question whether the agent is personally liable must be determined in the context of the background against which the contract was made<sup>4</sup>.

1 *Saxon v Blake* (1861) 29 Beav 438; *Re Southampton, Isle of Wight and Portsmouth Improved Steam Boat Co Ltd, Bird's Case* (1864) 4 De GJ & Sm 200; *Seaber v Hawkes* (1831) 5 Moo & P 549. See also *Collins v Associated Greyhound Racecourses Ltd* [1930] 1 Ch 1, CA; *Ernest Scragg & Sons Ltd v Perseverance Banking and Trust Co Ltd* [1973] 2 Lloyd's Rep 101, CA (order form signed 'for and on behalf of' the agents: agents liable). As to the liability of the principal see PARAS 125-140.

2 *Dramburg v Pollitzer* (1873) 28 LT 470; cf *Basma v Weekes* [1950] AC 441, [1950] 2 All ER 146, PC. For a consideration of the position where the third party elects to look only to the agent see PARA 131.

3 *Savills v Scott* [1988] 1 EGLR 20, [1988] 12 EG 115, DC.

4 *N & J Vlassopoulos Ltd v Ney Shipping Ltd, The Santa Carina* [1977] 1 Lloyd's Rep 478, CA (contract made by telephone; although fact of agency not specifically mentioned, the circumstances were such that it must have been presumed).

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/7. RELATIONS BETWEEN AGENT AND THIRD PERSONS/(1) LIABILITIES OF AGENT/(i) On Contracts/157. Identity of principal not disclosed.

### **157. Identity of principal not disclosed.**

Where an agent in making a contract discloses the existence, but not the name, of a principal on whose behalf he is acting, he is not made liable by the mere fact of not disclosing the name, for that is only a relevant factor in deciding whether the agent contracted personally or not<sup>1</sup>, although he may become liable, for example, by trade usage<sup>2</sup>. The issue of liability depends upon the terms in which the agent contracted, and the fact of non-disclosure of the identity of the principal will not be conclusive either way<sup>3</sup>.

Prima facie a party is personally liable on a contract if he puts his unqualified signature to it<sup>4</sup>. In order, therefore, to exonerate the agent from liability, the contract must show, when construed as a whole, that he contracted as agent only, and did not undertake any personal liability<sup>5</sup>. It is not sufficient that he should have described himself in the contract as an agent<sup>6</sup>, for the contract and the surrounding circumstances may indicate that he is liable<sup>7</sup>. If he states in the contract<sup>8</sup>, or indicates by an addition to his signature<sup>9</sup>, that he is contracting as agent only on behalf of a principal, he is not liable, unless the rest of the contract clearly involves his personal liability<sup>10</sup>, or unless he is shown to be the real principal<sup>11</sup>.

The words 'as agents', 'on account of', 'on behalf of', and 'for' are conclusive when qualifying the signature to negative responsibility of the signatory as principal<sup>12</sup> whether the identity of the actual principal is disclosed or not<sup>13</sup>, and notwithstanding that the contract may impose active obligations upon the agent towards the other contracting party<sup>14</sup>. If the addition to the signature is merely 'agent' the effect will depend on whether the term is used as a description or as a qualification<sup>15</sup>. The mere addition of the words 'secretary' or 'director' to the signature of a company's agent will not be sufficient to avoid his personal responsibility<sup>16</sup>.

When, on the construction of a written contract, the agent is held not to have contracted personally, evidence of usage may be admissible to make him liable<sup>17</sup>, unless the usage is inconsistent with the express contract<sup>18</sup>. No oral evidence of intention is, however, admissible to exonerate him from liability contrary to the terms of the contract<sup>19</sup>, except that by way of defence he may set up an express agreement between himself and the other contracting party to that effect<sup>20</sup>.

An employer's liability policy is not a personal contract of the type which excludes rights of an undisclosed principal<sup>21</sup>.

1 *Hutchinson v Tatham* (1873) LR 8 CP 482; *Southwell v Bowditch* (1876) 1 CPD 374, CA. See also *Hobhouse v Hamilton* (1826) 1 Hog 401; *Franklyn v Lamond* (1847) 4 CB 637; *Wakefield v Duckworth & Co* [1915] 1 KB 218, CA. See also PARA 167. The agent is not a trustee for his principal vis-à-vis the third party: *Pople v Evans* [1969] 2 Ch 255, [1968] 2 All ER 743.

2 *Anglo Overseas Transport Ltd v Titan Industrial Corp'n (United Kingdom) Ltd* [1959] 2 Lloyd's Rep 152; *Perishables Transport Co Ltd v N Spyropoulos (London) Ltd* [1964] 2 Lloyd's Rep 379.

3 *Jones v Littledale* (1837) 6 Ad & El 486; *Southwell v Bowditch* (1876) 1 CPD 374, CA; *Associated Portland Cement Manufacturers (1910) Ltd v Ashton* [1915] 2 KB 1, CA. Cf *Chidley v Norris* (1862) 3 F & F 228; *Wakefield v Duckworth & Co* [1915] 1 KB 218, CA; *Benton v Campbell, Parker & Co Ltd* [1925] 2 KB 410; *Hichens, Harrison, Woolston & Co v Jackson & Sons* [1943] AC 266, [1943] 1 All ER 128, HL. As to the liability of the principal, and his rights to sue, on a contract to which he is not party see PARAS 125-140.

4 See **CONTRACT** vol 9(1) (Reissue) PARA 686. As to the position with regard to an oral contract see *N & J Vlassopoulos Ltd v Ney Shipping Ltd, The Santa Carina* [1977] 1 Lloyd's Rep 478, CA.

5 *Thomson v Davenport* (1829) 9 B & C 78; *Hutcheson v Eaton* (1884) 13 QBD 861, CA; *Samuel Bros Ltd v Whetherly* [1908] 1 KB 184, CA; *Bridges and Salmon Ltd v The Swan (Owner), The Swan* [1968] 1 Lloyd's Rep 5; *Freimuller (Ships Stores) Ltd v Ocean Carriers (London) Ltd* [1961] 2 Lloyd's Rep 309; cf *Henry Browne & Sons Ltd v Smith* [1964] 2 Lloyd's Rep 476; *Tudor Marine Ltd v Tradex Export SA, The Virgo* [1976] 2 Lloyd's Rep 135, CA. The agent will be exonerated if he shows that he stipulated that his personal liability should cease in events which have happened: *Oglesby v Yglesias* (1858) EB & E 930.

6 *Parker v Winlow* (1857) 7 E & B 942; *Oglesby v Yglesias* (1858) EB & E 930. See also *Hutcheson v Eaton* (1884) 13 QBD 861, CA; *Landes v Marcus and Davids* (1909) 25 TLR 478.

7 *Rusholme and Bolton and Roberts Hadfield Ltd v SG Read & Co (London) Ltd* [1955] 1 All ER 180, [1955] 1 WLR 146 (assumption of liability of principal buyers as between selves and sellers by confirming house on confirmation). A confirming house guarantees that orders will be carried out: *Sobell Industries Ltd v Cory Bros & Co Ltd* [1955] 2 Lloyd's Rep 82.

8 *Gadd v Houghton* (1876) 1 ExD 357, CA; *Ogden v Hall* (1879) 40 LT 751; *Southwell v Bowditch* (1876) 1 CPD 374, CA. *Gadd v Houghton* has been extensively followed and is regarded in the more recent decisions on this topic as the leading case.

9 *Hutcheson v Eaton* (1884) 13 QBD 861, CA; *Fleet v Murton* (1871) LR 7 QB 126. See also the cases cited in note 12. As to the signature of documents by the agent in his own name see PARA 159.

10 This has been said to be 'a highly improbable and conjectural case'; see *Universal Steam Navigation Co Ltd v James McKelvie & Co* [1923] AC 492 at 499, HL, per Lord Shaw. See also *Weidner v Hoggett* (1876) 1 CPD 533.

11 *Carr v Jackson* (1852) 7 Exch 382; *Gardiner v Heading* [1928] 2 KB 284, CA. If, however, the agent is unable to show who is the real principal, he may be held liable on the contract: *Owen v Gooch* (1797) 2 Esp 567; *Hersom v Bennett* [1955] 1 QB 98, [1954] 3 All ER 370 (where evidence of agent disbelieved with respect to alleged principal; agent not permitted to escape liability by alleging existence of another unnamed principal).

12 *Gadd v Houghton* (1876) 1 ExD 357, CA; *W and T Avery Ltd v Charlesworth* (1914) 31 TLR 52, CA; *Ariadne Steamship Co v James McKelvie & Co* [1922] 1 KB 518, CA (affd sub nom *Universal Steam Navigation Co Ltd v James McKelvie & Co* [1923] AC 492, HL); *Kimber Coal Co v Stone and Rolfe Ltd* [1926] AC 414, HL. See also *Flatau, Dick & Co v Keeping* (1931) 36 Com Cas 243, CA; *North Eastern Timber Importers Ltd v Ch Arendt & Sons and Impresa Cerrito* [1952] 2 Lloyd's Rep 513; *Lester v Balfour Williamson Merchant Shippers Ltd* [1953] 2 QB 168, [1953] 1 All ER 1146, DC; following *Gadd v Houghton*.

13 *Ariadne Steamship Co v James McKelvie & Co* [1922] 1 KB 518, CA (affd sub nom *Universal Steam Navigation Co Ltd v James McKelvie & Co* [1923] AC 492, HL); *Lovesy v Palmer* [1916] 2 Ch 233.

14 As in *Universal Steam Navigation Co Ltd v James McKelvie & Co* [1923] AC 492, HL, and *Kimber Coal Co v Stone and Rolfe Ltd* [1926] AC 414, HL.

15 See *Gadd v Houghton* (1876) 1 ExD 357, CA; and *Universal Steam Navigation Co Ltd v James McKelvie & Co* [1923] AC 492, HL.

16 *Brebner v Henderson* 1925 SC 643, Ct of Sess. See also notes 9, 12.

17 *Hutchinson v Tatham* (1873) LR 8 CP 482; *Fleet v Murton* (1871) LR 7 QB 126; *Pike v Ongley* (1887) 18 QBD 708, CA; *Dale v Humfrey* (1858) EB & E 1004, Ex Ch; *Imperial Bank v London and St Katharine Docks Co* (1877) 5 ChD 195; *Bacmeister v Fenton, Levy & Co* (1883) Cab & El 121; *Benton v Campbell, Parker & Co Ltd* [1925] 2 KB 410.

18 *Robinson v Mollett* (1875) LR 7 HL 802; *Barrow & Bros v Dyster, Nalder & Co* (1884) 13 QBD 635, DC; and see *Miller, Gibb & Co v Smith and Tyrer Ltd* [1917] 2 KB 141, CA. As to the incorporation of usages in contracts made by the agent see generally PARA 44.

19 *Higgins v Senior* (1841) 8 M & W 834; *Jones v Littledale* (1837) 6 Ad & El 486; *Lindsay v Craig* 1919 SC 139.

20 *Wake v Harrop* (1862) 1 H & C 202, Ex Ch.

21 *Siu Yin Kwan v Eastern Insurance Co Ltd* [1994] 2 AC 199, [1994] 1 All ER 213, PC.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/7. RELATIONS BETWEEN AGENT AND THIRD PERSONS/(1) LIABILITIES OF AGENT/(i) On Contracts/158. Identity of principal disclosed.

### 158. Identity of principal disclosed.

Where an agent in making a contract discloses both the existence and the name of a principal on whose behalf he purports to make it, the agent is not, as a general rule, liable on the contract to the other contracting party<sup>1</sup>, whether he had in fact authority to make it or not<sup>2</sup>; but a personal liability may be imposed upon him by the express terms of the contract<sup>3</sup>, by the ordinary course of business<sup>4</sup>, or by usage<sup>5</sup>, and he will be liable for breach of warranty of authority in cases where he had no authority<sup>6</sup>.

Further, the agent is personally liable on the contract if it is shown that he is the real principal<sup>7</sup>, or that the principal named by him is non-existent<sup>8</sup> or incapable of making the contract in question<sup>9</sup>, or is not the real principal although there might be another principal in existence<sup>10</sup>. The agent is also liable if he holds himself out as agent for a named person, but is in fact agent for an unnamed person<sup>11</sup>.

1 *Jenkins v Hutchinson* (1849) 13 QB 744; *Paquin Ltd v Beauclerk* [1906] AC 148, HL; *Stewart v Engel* [2000] 3 All ER 518 (liquidators relied on a contractual term which stated they were agents of the company in liquidation and were not personally liable for negligently performing the contract). The same rule applies to public agents contracting on behalf of the Crown (*Macbeath v Haldimand* (1786) 1 Term Rep 172; *O'Grady v Cardwell* (1872) 20 WR 342; *Hosier Bros v Earl of Derby* [1918] 2 KB 671, CA); see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 388.

2 *Lewis v Nicholson* (1852) 18 QB 503. He may, however, be made liable in tort in respect of fraud or the obtaining of money: see *TD Keegan Ltd v Palmer* [1961] 2 Lloyd's Rep 449 (money recoverable from agent where obtained by agent by duress and paid into company account). As to the liability of an unauthorised agent for breach of warranty of authority see PARAS 160-161.

3 *Hall v Ashurst* (1833) 1 Cr & M 714; *McCollin v Gilpin* (1881) 6 QBD 516, CA; *Woolfe v Horne* (1877) 2 QBD 355; *Burrell v Jones* (1819) 3 B & Ald 47; *Parker v Winlow* (1857) 7 E & B 942; and contrast *Redpath v Wigg* (1866) LR 1 Exch 335. A public agent may bind himself personally; see *Clutterbuck v Coffin* (1842) 3 Man & G 842; *Graham v Public Works Comrs* [1901] 2 KB 781; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 381. Whether or not an agent has so bound himself is a question of fact: *Auty v Hutchinson* (1848) 6 CB 266. See, however, *Foalquest Ltd v Roberts* [1990] 1 EGLR 50, [1990] 21 EG 156, CA (intention to make agent personally liable may be inferred).

4 *Warlow v Harrison* (1859) 1 E & E 309, Ex Ch; *Newton v Chambers* (1844) 1 Dow & L 869.

5 One example of such a usage is in the case of confirming houses: see *Sobell Industries v Cory Bros & Co Ltd* [1955] 2 Lloyd's Rep 82; *Anglo-African Shipping Co of New York Inc v J Mortner Ltd* [1962] 1 Lloyd's Rep 610, CA. For a consideration of stock exchange usages, see eg *Bayliffe v Butterworth* (1847) 1 Exch 425; *Hodgkinson v Kelly* (1868) LR 6 Eq 496. As to contracts made on behalf of foreign principals see PARA 129.

6 See PARAS 160-161.

7 *Jenkins v Hutchinson* (1849) 13 QB 744. This is so even though temporary credit has been mistakenly given to the supposed principal: *Gardiner v Heading* [1928] 2 KB 284, CA. See also *Wood v Baxter* (1883) 49 LT 45, DC; *Murphy v Jonathan Howlett (a firm)* (1960) 176 Estates Gazette 311.

8 *Kelner v Baxter* (1866) LR 2 CP 174; *Scott v Lord Ebury* (1867) LR 2 CP 255; *Wilson & Co v Baker, Lees & Co* (1901) 17 TLR 473. This is so unless the other contracting party did not intend to accept the agent's liability: *Jones v Hope* (1880) 3 TLR 247, CA; *Steele v Gourley and Davis* (1887) 3 TLR 772, CA; and see *Bailey v Macaulay* (1849) 13 QB 815. See also *Newborne v Sensolid (Great Britain) Ltd* [1954] 1 QB 45, [1953] 1 All ER 708, CA; *Black v Smallwood* (1966) 117 CLR 52, [1966] ALR 744, Aust HC; *Wickberg v Shatsky* (1969) 4 DLR (3d) 540, BC CA; see also the cases cited in PARA 157 note 5. By statute, the agent may incur personal liability where he purports to contract for an unformed company: see the Companies Act 1985 s 36C; PARA 61; and **COMPANIES** vol 14 (2009) PARA 66.

9 *Queensland Investment and Land Co Ltd v O'Connell and Palmer* (1896) 12 TLR 502.



10 *Hersom v Bennett* [1955] 1 QB 98, [1954] 3 All ER 370.

11 *Savills v Scott* [1988] 1 EGLR 20.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/7. RELATIONS BETWEEN AGENT AND THIRD PERSONS/(1) LIABILITIES OF AGENT/(i) On Contracts/159. Documents executed or signed in agent's name.

### 159. Documents executed or signed in agent's name.

An agent who executes a deed in his own name is personally liable upon it, whether he discloses the name and existence of his principal or not<sup>1</sup>.

In respect of bills of exchange, cheques and promissory notes signed by an agent on his principal's behalf, the agent is not liable unless he signs his own name<sup>2</sup>, in which case he is personally liable even though he adds to his signature words describing him as an agent<sup>3</sup>, unless he makes it perfectly clear that he is signing only on his principal's behalf<sup>4</sup>. He is not liable upon any acceptance in his own name<sup>5</sup>, unless the bill was in fact drawn upon him<sup>6</sup>, in which case he is liable although he purports to accept merely as agent<sup>7</sup>.

In the case of any other written contract signed by the agent in his own name, but purporting to be made on behalf of a named principal, the agent will not be personally liable, unless from the terms of the contract it appears that such was the intention of the parties<sup>8</sup>. Where the principal is a company registered under the Companies Act 1985, the requirements of that Act as to the appearance of the company's name in its correspondence etc must be complied with<sup>9</sup>. Failure to mention the company's name may lay the agent open to a fine<sup>10</sup>, and possibly expose him to personal liability<sup>11</sup>.

1 *Appleton v Binks* (1804) 5 East 148; *Hancock v Hodgson* (1827) 4 Bing 269; *Cass v Rudele* (1692) 2 Vern 280; *Chapman v Smith* [1907] 2 Ch 97. As to the liability of a public agent on a contract under seal made on behalf of the Crown see *Unwin v Wolseley* (1787) 1 Term Rep 674; *Cunningham v Collier* (1785) 4 Doug KB 233.

2 See the Bills of Exchange Act 1882 ss 23, 29; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARAS 1467-1468, 1485-1486.

3 Bills of Exchange Act 1882 s 26(1); *Leadbitter v Farrow* (1816) 5 M & S 345; *The Elmville* [1904] P 319; *Landes v Marcus and Davids* (1909) 25 TLR 478.

4 See the Bills of Exchange Act 1882 s 26(1); *Aggs v Nicholson* (1856) 1 H & N 165; *Alexander v Sizer* (1869) LR 4 Exch 102; *Lindus v Melrose* (1857) 3 H & N 177; *Chapman v Smethurst* [1909] 1 KB 927, CA; *Brebner v Henderson* 1925 SC 643, Ct of Sess; *Elliott v Bax-Ironside* [1925] 2 KB 301, CA; *Kettle v Dunster and Wakefield* (1927) 138 LT 158; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1476. Cf *Dutton v Marsh* (1871) LR 6 QB 361.

5 *F Stacey & Co Ltd v Wallis* (1912) 106 LT 544.

6 *Okell v Charles* (1876) 34 LT 822, CA; *Dermatine Co Ltd v Ashworth* (1905) 21 TLR 510.

7 *Jones v Jackson* (1870) 22 LT 828; *Mare v Charles* (1856) 5 E & B 978.

8 *Norton v Herron* (1825) 1 C & P 648; *W and T Avery Ltd v Charlesworth* (1914) 31 TLR 52, CA; and contrast *McCullin v Gilpin* (1881) 6 QBD 516, CA, with *Downman v Williams* (1845) 7 QB 103, Ex Ch.

9 See the Companies Act 1985 ss 349-351; and **COMPANIES** vol 14 (2009) PARA 221. Note that, as from a day to be appointed, the Companies Act 1985 is repealed and replaced by the Companies Act 2006: at the date at which this volume states the law no such day had been appointed. See also *Civil Service Co-operative Society Ltd v Chapman* (1914) 30 TLR 679.

10 As to the fine see the Companies Act 1985 s 349(3); and **COMPANIES** vol 14 (2009) PARA 221.

11 See the Companies Act 1985 s 349(4); and **COMPANIES** vol 14 (2009) PARA 221. See also *F Stacey & Co Ltd v Wallis* (1912) 106 LT 544; *Civil Service Co-operative Society Ltd v Chapman* (1914) 30 TLR 679.

## UPDATE

### 159 Documents executed or signed in agent's name

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/7. RELATIONS BETWEEN AGENT AND THIRD PERSONS/(1) LIABILITIES OF AGENT/(ii) Warranty of Authority/160. Warranty implied.

## (ii) Warranty of Authority

### 160. Warranty implied.

Where any person purports to do any act<sup>1</sup> or make any contract as agent on behalf of a principal, he is deemed to warrant<sup>2</sup> that he has in fact authority from such principal to do the act<sup>3</sup> or make the contract<sup>4</sup> in question. If, therefore, he has no such authority<sup>5</sup>, he is liable to be sued for breach of warranty of authority by any third person who was induced by his conduct in purporting to act as agent to believe that he had authority to do the act or make the contract, and who, by acting upon such belief, has suffered loss in consequence of the absence of authority<sup>6</sup>.

The agent's belief in the existence of his authority is immaterial<sup>7</sup>, whether the belief extends to an authority which the agent believed that he had but in fact never had, or to an authority which the agent originally had but which has ceased without his knowledge or means of knowledge<sup>8</sup>. He will not, however, be liable if at the time of doing the act or making the contract he expressly disclaims any present authority<sup>9</sup>, or if the other party knows that he has no authority<sup>10</sup>, or is fully acquainted with the facts from which the inference of authority is drawn<sup>11</sup>.

1     le such as the issue and preparation of a bill of lading: *Heskell v Continental Express Ltd* [1950] 1 All ER 1033, (1950) 94 Sol Jo 339; *V/O Rasnoimport v Guthrie & Co Ltd* [1966] 1 Lloyd's Rep 1.

2     Unless he is a public agent making a contract terminable at the pleasure of the Crown: *Dunn v Macdonald* [1897] 1 QB 555, CA. As to agents of the Crown see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 388.

3     *Starkey v Bank of England* [1903] AC 114, HL; *Yonge v Toynbee* [1910] 1 KB 215, CA; *Cherry and M'Dougall v Colonial Bank of Australasia* (1869) LR 3 PC 24; *Richardson v Williamson and Lawson* (1871) LR 6 QB 276; *Weeks v Propert* (1873) LR 8 CP 427.

4     *Collen v Wright* (1857) 8 E & B 647; *Simons v Patchett* (1857) 7 E & B 568; *Re National Coffee Palace Co, ex p Panmure* (1883) 24 ChD 367, CA; *Anderson v John Croall & Sons Ltd* (1903) 6 F 153, Ct of Sess; *Hughes v Graeme* (1864) 4 New Rep 190; *British Russian Gazette and Trade Outlook Ltd v Associated Newspapers Ltd* [1933] 2 KB 616, CA.

5     He is not liable for exceeding his real authority, if his apparent or ostensible authority would be sufficient to bind his principal: *Rainbow v Howkins* [1904] 2 KB 322. If the principal disputes the authority on a claim brought by the third person, the agent may be joined as defendant, and relief claimed against him in the

alternative: *Honduras Inter-Oceanic Rly Co v Lefevre and Tucker* (1877) 2 ExD 301, CA; and see *Massey v Heynes & Co* (1888) 21 QBD 330, CA; *Bennetts & Co v McIlwraith* [1896] 2 QB 464, CA.

6 See *Collen v Wright* (1857) 8 E & B 647, Ex Ch; *Starkey v Bank of England* [1903] AC 114, HL; and notes 3, 4. See also *Salvesen & Co v Rederi Aktiebolaget Nordstjernan* [1905] AC 302, HL. A warranty of authority may be implied even in the absence of any apparent or ostensible authority: see *V/O Rasnoimport v Guthrie & Co Ltd* [1966] 1 Lloyd's Rep 1.

7 *Starkey v Bank of England* [1903] AC 114, HL; *Firbank's Executors v Humphreys* (1886) 18 QBD 54, CA; *Chapleo v Brunswick Permanent Benefit Building Society* (1881) 6 QBD 696, CA. See also *Penn v Bristol and West Building Society* [1997] 3 All ER 470, [1997] 1 WLR 1356, CA (solicitor who mistakenly believed he had authority for a vendor and negotiated with the purchaser and the purchaser's building society's solicitor, gave a warranty of authority to both the purchaser and the building society); *Habton Farms v Nimmo* [2003] EWCA Civ 68, [2004] QB 1, sub nom *Nimmo v Habton Farms* [2003] 1 All ER 1136, applying *Suleman v Shahsavari* [1989] 2 All ER 460, [1988] 1 WLR 1181. If the agent is aware of the absence of authority, he may be sued either for breach of warranty of authority, or, if there was fraud, for deceit: *Polhill v Walter* (1832) 3 B & Ad 114.

8 *Yonge v Toynbee* [1910] 1 KB 215, CA; *Simmons v Liberal Opinion Ltd, Re Dunn* [1911] 1 KB 966, CA.

9 *Halbot v Lens* [1901] 1 Ch 344; *Yonge v Toynbee* [1910] 1 KB 215, CA.

10 *Halbot v Lens* [1901] 1 Ch 344.

11 *Smout v Ilbery* (1842) 10 M & W 1, may still be an authority for this proposition, but in so far as it decides that an agent innocently continuing to act without knowledge of revocation of his authority is not liable to the third party, and as interpreted in *Salton v New Beeston Cycle Co* [1900] 1 Ch 43, it has been overruled by *Yonge v Toynbee* [1910] 1 KB 215, CA. See also *McManus v Fortescue* [1907] 2 KB 1, CA; and contrast *Lilly, Wilson & Co v Smales, Eeles & Co* [1892] 1 QB 456, with *Suart v Haigh* (1893) 9 TLR 488, HL; and cf *West London Commercial Bank Ltd v Kitson* (1884) 13 QBD 360, CA. When the evidence of the agency is an inference of law, the agent is not liable, provided that the facts are equally within the knowledge of both parties: *Eaglesfield v Marquis of Londonderry* (1878) 38 LT 303; *Jones v Hope* (1880) 3 TLR 247, CA; *Rashdall v Ford* (1866) LR 2 Eq 750.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/7. RELATIONS BETWEEN AGENT AND THIRD PERSONS/(1) LIABILITIES OF AGENT/(ii) Warranty of Authority/161. Measure of damages for breach of warranty.

### 161. Measure of damages for breach of warranty.

The measure of damages for a breach of warranty of authority is the measure normally applicable in contract, namely loss actually sustained by the third person as the natural and probable consequence of the non-existence of the authority or such as both parties might reasonably expect to result as a probable consequence of the breach of warranty<sup>1</sup>. In the case of a contract made without authority and repudiated by the principal, the loss will be the amount that could have been recovered from the principal on a claim for breach of the contract if it had in fact been made with his authority<sup>2</sup>, together with the costs of any claim upon the contract reasonably brought by the third person against him<sup>3</sup>.

1 *Collen v Wright* (1857) 8 E & B 647; *Starkey v Bank of England* [1903] AC 114, HL; *Firbank's Executors v Humphreys* (1886) 18 QBD 54, CA; *Richardson v Williamson and Lawson* (1871) LR 6 QB 276; *Meek v Wendt & Co* (1888) 21 QBD 126 (affd [1889] WN 14, CA); *Hubbart v Phillips* (1845) 2 Dow & L 707; *Salvesen & Co v Rederi Aktiebolaget Nordstjernan* [1905] AC 302, HL; and see *Salton v New Beeston Cycle Co* [1900] 1 Ch 43. Thus, in the case of a solicitor who continues proceedings without authority the measure of damages is the amount of costs thrown away by the other party to the proceedings: *Yonge v Toynbee* [1910] 1 KB 215, CA; *Fernée v Gorlitz* [1915] 1 Ch 177. As to damages for breach of contract generally see **DAMAGES** vol 12(1) (Reissue) PARA 941 et seq.

2 *Simons v Patchett* (1857) 7 E & B 568; *Richardson v Williamson and Lawson* (1871) LR 6 QB 276; *Suart v Haigh* (1893) 9 TLR 488, HL; *Heskell v Continental Express Ltd* [1950] 1 All ER 1033. The contract must not have

been one which would have been unenforceable against the principal owing to the absence of some formality: *Warr v Jones* (1876) 24 WR 695; and see *Rainbow v Hawkins* [1904] 2 KB 322.

3 *Hughes v Graeme* (1864) 4 New Rep 190; *Spedding v Nevell* (1869) LR 4 CP 212; *Godwin v Francis* (1870) LR 5 CP 295; *D'Almeida Araujo Lda v Becker & Co Ltd* [1953] 2 QB 329, [1953] 2 All ER 288; and contrast *Pow v Davis* (1861) 1 B & S 220. See also *Osman v J Ralph Moss Ltd* [1970] 1 Lloyd's Rep 313, CA, for the measure of damages where the principal sues the agent.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/7. RELATIONS BETWEEN AGENT AND THIRD PERSONS/(1) LIABILITIES OF AGENT/(iii) Money Received by Agent/162. Liability to repay to third person.

### (iii) Money Received by Agent

#### 162. Liability to repay to third person.

The receipt of money from a third person by an agent on his principal's behalf does not in itself render the agent personally liable to repay it when the third person becomes entitled as against the principal to repayment, whether the money remains in the agent's hands or not<sup>1</sup>. If, however, a third person pays money to an agent under a mistake of fact<sup>2</sup>, or in consequence of some wrongful act<sup>3</sup>, the agent is personally liable to repay it<sup>4</sup>, unless, before the claim for repayment was made upon him, he has paid it to the principal or done something equivalent to payment to his principal<sup>5</sup>, or where the principal is a foreign sovereign immune from suit<sup>6</sup>. Where, however, the agent has been a party to the wrongful act<sup>7</sup>, or has acted as a principal in the transaction<sup>8</sup>, in consequence of which the money has been paid to him, he is not discharged from his liability to make repayment by any payment over to his principal<sup>9</sup>.

1 *Ellis v Goulton* [1893] 1 QB 350, CA; *Bamford v Shuttleworth* (1840) 11 Ad & El 926; *Steam Saw Mills Co Ltd v Baring Bros & Co Ltd*, *Archangel Saw Mills Co v Baring Bros & Co Ltd* [1922] 1 Ch 244, CA; see also *Hindle v Brown* (1908) 98 LT 791, CA.

2 *Cox v Prentice* (1815) 3 M & S 344; *Taylor v Metropolitan Rly Co* [1906] 2 KB 55.

3 *Holland v Russell* (1863) 4 B & S 14; *Galland v Hall* (1888) 4 TLR 761, CA; *East India Co v Tritton* (1824) 5 Dow & Ry KB 214; *Re Bourne, ex p Bird* (1851) 4 De G & Sm 273.

4 It is not necessary to make the principal, who has knowledge of the payment, a party to the proceedings: *Cary v Webster* (1721) 1 Stra 480; *Admiralty Comrs v National Provincial and Union Bank of England Ltd* (1922) 127 LT 452. A bank is in the same position as any other agent: *Admiralty Comrs v National Provincial and Union Bank of England Ltd*; *Kerrison v Glyn, Mills, Currie & Co* (1911) 81 LJB 465, HL.

5 *Pollard v Bank of England* (1871) LR 6 QB 623; *Kleinwort, Sons & Co v Dunlop Rubber Co* (1907) 97 LT 263, HL; *Gowers v Lloyds and National Provincial Foreign Bank Ltd* [1938] 1 All ER 766, 158 LT 467, CA; *Cox v Prentice* (1815) 3 M & S 344; *Baylis v Bishop of London* [1913] 1 Ch 127, CA. Merely crediting the principal with the amount without there being any change of circumstances rendering it inequitable for the agent to refund the money is not sufficient: *Buller v Harrison* (1777) 2 Cowp 565; *Cox v Prentice*; *Continental Caoutchouc and Gutta Percha Co v Kleinwort, Sons & Co* (1904) 90 LT 474, CA; *Scottish Metropolitan Assurance Co Ltd v P Samuel & Co Ltd* [1923] 1 KB 348.

6 *Rahimtoola v Nizam of Hyderabad* [1958] AC 379, [1957] 3 All ER 441, HL. The doctrine of sovereign immunity is modified by the State Immunity Act 1978: see generally **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARA 244 et seq.

7 *Close v Phipps* (1844) 7 Man & G 586; *Snowdon v Davis* (1808) 1 Taunt 359; *Re Chapman, ex p Edwards* (1884) 13 QBD 747, CA; *Wakefield v Newbon* (1844) 6 QB 276. This is so unless both parties are *in pari delicto*: *Goodall v Lowndes* (1844) 6 QB 464.

8 *Newall v Tomlinson* (1871) LR 6 CP 405; *Kleinwort, Sons & Co v Dunlop Rubber Co* (1907) 97 LT 263, HL.

9 *Citizens' Bank of Louisiana and New Orleans Canal and Banking Co v First National Bank of New Orleans* (1873) LR 6 HL 352; *Stewart v Fry and Chapman* (1817) 7 Taunt 339. The same rule applies to public agents, whether of the British Crown (*Gidley v Lord Palmerston* (1822) 3 Brod & Bing 275; *R v Secretary of State for War* [1891] 2 QB 326, CA; *Kinloch v Secretary of State for India in Council* (1882) 7 App Cas 619, HL; *Salaman v Secretary of State for India* [1906] 1 KB 613, CA), or of foreign governments (*Henderson v Rothschild & Sons* (1887) 56 LJ Ch 471, CA; *Twycross v Dreyfus* (1877) 5 ChD 605, CA).

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/7. RELATIONS BETWEEN AGENT AND THIRD PERSONS/(1) LIABILITIES OF AGENT/(iii) Money Received by Agent/163. Direction from principal to pay to third person.

### 163. Direction from principal to pay to third person.

Where an agent is directed by his principal to pay to a third person any money which he has received or is about to receive on his principal's behalf, he is not in general responsible to the third person if he fails to do so<sup>1</sup>, notwithstanding the fact that the money is received by him from the principal for the express purpose of paying it over to the third person<sup>2</sup>, or that his failure to comply with the direction is a breach of duty towards his principal<sup>3</sup>. The agent renders himself personally liable, however, if he assents to the direction, and the assent is communicated to the third person<sup>4</sup>, or if he enters into an unconditional undertaking<sup>5</sup> to pay the money to the third person or to hold it on his behalf<sup>6</sup>. In this case he is not discharged from liability by the subsequent bankruptcy of the principal<sup>7</sup>, or the purported revocation of his authority to pay<sup>8</sup>.

If the direction is not a mere authority to make the payment<sup>9</sup>, but amounts to an assignment of a specific fund, or a charge upon it<sup>10</sup>, the agent, upon receiving notice of the assignment or charge, becomes liable to the third person for the amount due to him thereunder. The agent will not, however, be deprived thereby of any right of lien or set-off which accrued before he received such notice<sup>11</sup>.

1 *Citizens' Bank of Louisiana and New Orleans Canal and Banking Co v First National Bank of New Orleans* (1873) LR 6 HL 352; *Stewart v Fry and Chapman* (1817) 7 Taunt 339. The same rule applies to public agents, whether of the British Crown (*Gidley v Lord Palmerston* (1822) 3 Brod & Bing 275; *R v Secretary of State for War* [1891] 2 QB 326, CA; *Kinloch v Secretary of State for India in Council* (1882) 7 App Cas 619, HL; *Salaman v Secretary of State for India* [1906] 1 KB 613, CA), or of foreign governments (*Henderson v Rothschild & Sons* (1887) 56 LJ Ch 471, CA; *Twycross v Dreyfus* (1877) 5 ChD 605, CA).

2 *Moore v Bushell* (1857) 27 LJ Ex 3.

3 *Schroeder v Central Bank of London Ltd* (1876) 34 LT 735.

4 *Walker v Rostron* (1842) 9 M & W 411; *Noble v National Discount Co* (1860) 5 H & N 225; *Lilly v Hays* (1836) 5 Ad & El 548; *Griffin v Weatherby* (1868) LR 3 QB 753. This rule applies in other situations: see eg *Shamia v Joory* [1958] 1 QB 448, [1958] 1 All ER 111 (money owed by principal to agent; direction by agent to principal to pay third party).

5 *Brind v Hampshire* (1836) 1 M & W 365; *Malcolm v Scott* (1850) 5 Exch 601.

6 *Crowfoot v Gurney* (1832) 9 Bing 372; *Williams v Everett* (1811) 14 East 582; *Scott v Porcher* (1817) 3 Mer 652. If the undertaking to pay was subject to a condition, the condition must have been accepted by the third person (*Baron v Husband* (1833) 4 B & Ad 611), and must have been fulfilled (*Stevens v Hill* (1805) 5 Esp 247). If the condition is to pay when the money is received from the principal, the agent is only liable for the amount which he actually receives: *Langston v Corney* (1815) 4 Camp 176.

7 *Crowfoot v Gurney* (1832) 9 Bing 372; *Walker v Rostron* (1842) 9 M & W 411.

8 *Robertson v Fauntleroy* (1823) 8 Moore CP 10.

9 *Re Whitting, ex p Hall* (1878) 10 ChD 615; affd 10 ChD 619, CA.

10 *William Brandt's Sons & Co v Dunlop Rubber Co Ltd* [1905] AC 454, HL; *Rodick v Gandell* (1851) 1 De GM & G 763; for a consideration of the assignment of debts, and the meaning to be given to assignment from a 'fund', see *Shamia v Joory* [1958] 1 QB 448, [1958] 1 All ER 111.

11 *Webb v Smith* (1885) 30 ChD 192, CA; *Roxburghe v Cox* (1881) 17 ChD 520, CA. See further **CHOSES IN ACTION** vol 13 (2009) PARA 63.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/7. RELATIONS BETWEEN AGENT AND THIRD PERSONS/(1) LIABILITIES OF AGENT/(iv) Tort Liability; Breach of Trust/164. General liability.

## (iv) Tort Liability; Breach of Trust

### 164. General liability.

Any agent, including a public agent<sup>1</sup>, who commits a wrongful act<sup>2</sup> in the course of his employment, is personally liable<sup>3</sup> to any third person who suffers loss or damage thereby<sup>4</sup>, notwithstanding that the act was expressly authorised or ratified by the principal<sup>5</sup>, unless it was thereby deprived of its wrongful character<sup>6</sup>. It is immaterial that the agent did the act innocently and without knowledge that it was wrongful<sup>7</sup>, except in cases where actual malice is essential to constitute the wrong<sup>8</sup>. An agent cannot rely upon an exclusion clause contained in the contract between the principal and the third party<sup>9</sup>, unless on the wording of the contract the principal has contracted not only on his own behalf, but also on behalf of his agent<sup>10</sup>.

1 *Entick v Carrington* (1765) 19 State Tr 1029; *Sinclair v Broughton and Government of India* (1882) 47 LT 170, PC; *Hamilton v Clancy* [1914] 2 IR 514; *Roper v Public Works Comrs* [1915] 1 KB 45; and see *Dixon v London Small Arms Co* (1876) 1 App Cas 632, HL. At common law a public agent could not be sued in his official capacity: *Raleigh v Goschen* [1898] 1 Ch 73; *Bainbridge v Postmaster-General* [1906] 1 KB 178, CA; *Roper v Public Works Comrs*. As to proceedings against government departments and the liability of Crown servants see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARAS 381 et seq, 388. As to the immunity from legal process of diplomatic agents of foreign governments see **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARA 274.

2 As to what acts of the agent are sufficient to impose liability, contrast *Adair v Young* (1879) 12 ChD 13, CA, with *Nobel's Explosive Co Ltd v Jones, Scott & Co* (1882) 8 App Cas 5, HL; see also *TD Keegan Ltd v Palmer* [1961] 2 Lloyd's Rep 449. The act must be his personal act, and he is not liable for the acts of his co-agents (*Re Denham & Co* (1883) 25 ChD 752) or sub-agents (*Stone v Cartwright* (1795) 6 Term Rep 411), unless he is a partner (*Weir v Bell* (1878) 3 ExD 238, CA), or has otherwise made himself a principal in the transaction (*Cargill v Bower* (1878) 10 ChD 502; *Weir v Bell*), or unless he is made liable by statute.

3 The agent can be sued notwithstanding that judgment has been obtained against the principal: see the Civil Liability (Contribution) Act 1978 s 1; and **TORT** vol 45(2) (Reissue) PARA 349 et seq.

4 *Bennett v Bayes, Pennington and Harrison* (1860) 5 H & N 391; *Arnot v Biscoe* (1748) 1 Ves Sen 95; *Swift v Jewsbury and Goddard* (1874) LR 9 QB 301, Ex Ch; *Lowe v Dorling & Son* [1906] 2 KB 772, CA; *Re National Funds Assurance Co* (1878) 10 ChD 118; *Cullen v Thomson's Trustees* (1862) 4 Macq 424, HL; *Cope v Sharpe (No 2)* [1912] 1 KB 496, CA.

5 *Johnson v Emerson and Sparrow* (1871) LR 6 Exch 329. As to the liability of the principal see generally PARAS 150-154. As to the right of the third party to rescission of contracts made as a result of a misrepresentation by the agent see PARA 135; and see also PARAS 152-153. For a consideration of the tort of conversion by an agent see PARA 165.

6 *Hull v Pickersgill* (1819) 1 Brod & Bing 282; *Anderson v Watson* (1827) 3 C & P 214; *Sykes v Sykes* (1870) LR 5 CP 113; and contrast *Sharland v Mildon* (1846) 5 Hare 469; *Padget v Priest* (1787) 2 Term Rep 97; see also *Egger v Viscount Chelmsford* [1965] 1 QB 248, [1964] 3 All ER 406, CA (agent relying on qualified privilege was held not to be affected by malice of principal). As to ratification of acts of agents of the Crown see PARA 70.

7 *Baschet v London Illustrated Standard Co* [1900] 1 Ch 73.

8 *Eaglesfield v Marquis of Londonderry* (1878) 38 LT 303; *Tims v John Lewis & Co Ltd* [1951] 2 KB 459, [1951] 1 All ER 814, CA (revsd sub nom *John Lewis & Co Ltd v Tims* [1952] AC 676, [1952] 1 All ER 1203, HL, but approved on this point).

9 *Adler v Dickson* [1955] 1 QB 158, [1954] 3 All ER 397, CA; *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446, [1962] 1 All ER 1, HL; *Canadian General Electric Co Ltd v The Lake Bosomtwe and Pickford and Black Ltd* [1970] 2 Lloyd's Rep 81. A contract expressly providing that it is made for the benefit of another person points strongly to the conclusion that it has been made on his behalf, especially if he will not be entitled to the benefit of the contract unless it was so made: see *Borvigilant (Owners) v Romina G (Owners)* [2003] EWCA Civ 935, [2003] 2 All ER (Comm) 736.

10 *Pyrene Co v Scindia Navigation Co* [1954] 2 QB 402, [1954] 2 All ER 158; *Aalsey Steam Fishing Co Ltd v Hillman (Owners)*, *The Kirknes* [1957] P 51, [1957] 1 All ER 97. The limitations on liability of shipowners and carriers by air conferred by statute extend also to their servants and agents acting in the course of their employment: see the Merchant Shipping Act 1995 ss 185, 186; and **SHIPPING AND MARITIME LAW** vol 94 (2008) PARAS 1042-1059; and see the various versions of the Carriage by Air Act 1961 s 1, Sch 1 art 25A; the Carriage by Air (Supplementary Provisions) Act 1962 s 1, Schedule Art V; and **CARRIAGE AND CARRIERS** vol 7 (2008) PARAS 121 et seq, 154 et seq.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/7. RELATIONS BETWEEN AGENT AND THIRD PERSONS/(1) LIABILITIES OF AGENT/(iv) Tort Liability; Breach of Trust/165. Conversion.

## 165. Conversion.

Any agent who, while acting on his principal's behalf, acquires the actual or constructive<sup>1</sup> possession of goods<sup>2</sup> or securities<sup>3</sup> which are not in fact the property of his principal, and deals with them in any manner which is obviously wrongful if his principal is not their owner<sup>4</sup> or duly authorised by their owner, as by selling and delivering them to a stranger<sup>5</sup>, or otherwise purporting to dispose of the property in them<sup>6</sup>, is guilty of a conversion<sup>7</sup>, and is liable to their true owner for their value. His liability is not affected by the fact that he received them in good faith as the property of his principal, and dealt with them in accordance with his principal's instructions and in ignorance of the true owner's claim<sup>8</sup>, unless the true owner is estopped from denying the principal's authority to dispose of them<sup>9</sup>, or unless the agent is a banker receiving payment<sup>10</sup> of a cheque on behalf of a customer<sup>11</sup>.

No agent is guilty of a conversion, however, who, not being in possession of the goods or securities, merely negotiates a contract of sale between his principal and a third person<sup>12</sup>, or who, though being in possession of them, does not do any act which is obviously wrongful if the principal is not the true owner, but deals only with the possession of them as directed by his principal without purporting to dispose of the property in them<sup>13</sup>. Nevertheless any dealings whatsoever with the goods or securities against the will of the true owner will amount to a conversion if done with notice of his claim<sup>14</sup>.

1 *Union Credit Bank Ltd v Mersey Docks and Harbour Board* [1899] 2 QB 205.

2 *Consolidated Co v Curtis & Son* [1892] 1 QB 495; *Cochrane v Rymill* (1879) 40 LT 744, CA; *Hollins v Fowler* (1875) LR 7 HL 757; *Stephens v Elwall* (1815) 4 M & S 259.

3 *Great Western Rly Co v London and County Banking Co Ltd* [1901] AC 414, HL; *Arnold v Cheque Bank* (1876) 1 CPD 578; *Fine Art Society Ltd v Union Bank of London Ltd* (1886) 17 QBD 705, CA.

4 *McEntire v Potter & Co* (1889) 22 QBD 438.

5 *Consolidated Co v Curtis & Son* [1892] 1 QB 495; *Cochrane v Rymill* (1879) 40 LT 744, CA; *Hollins v Fowler* (1875) LR 7 HL 757.

6 *McEntire v Potter & Co* (1889) 22 QBD 438; *Stephens v Elwall* (1815) 4 M & S 259; *Pearson v Graham* (1837) 6 Ad & El 899.

- 7 As to conversion generally see **TORT** vol 45(2) (Reissue) PARAS 548-658.
- 8 See the cases cited in notes 1-6.
- 9 As to where the principal is a mercantile agent, or buyer or seller in possession of goods or the documents of title thereto with the consent of the true owner, see the Factors Act 1889 ss 2, 8, 9; the Sale of Goods Act 1979 ss 24, 25; PARAS 148-149; and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARAS 157-158.
- 10 This does not apply to any other instrument: *Bavins, Junr, and Sims v London and South Western Bank Ltd* [1900] 1 QB 270, CA.
- 11 See the Cheques Act 1957 s 4; *Orbit Mining and Trading Co Ltd v Westminster Bank Ltd* [1963] 1 QB 794, [1962] 3 All ER 565, CA; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 882.
- 12 *Cochrane v Rymill* (1879) 40 LT 744, CA; *Barker v Furlong* [1891] 2 Ch 172.
- 13 *National Mercantile Bank v Rymill* (1881) 44 LT 767, CA; *Union Credit Bank Ltd v Mersey Docks and Harbour Board* [1899] 2 QB 205; *Barker v Furlong* [1891] 2 Ch 172.
- 14 *Davis v Artingstall* (1880) 49 LJ Ch 609. A refusal to deliver up the goods without an order from the principal, or a request for a reasonable time for inquiry, will not of itself amount to conversion: *Alexander v Southey* (1821) 5 B & Ald 247; *Pillott v Wilkinson* (1864) 3 H & C 345, Ex Ch.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/7. RELATIONS BETWEEN AGENT AND THIRD PERSONS/(1) LIABILITIES OF AGENT/(iv) Tort Liability; Breach of Trust/166. Breach of trust.

## 166. Breach of trust.

No agent, who is in possession of property which his principal holds in trust for another<sup>1</sup> and who makes, on the instructions of his principal, any disposition of such property which is inconsistent with the trust, is guilty of a breach of trust<sup>2</sup>, unless he had notice of the trust at the time<sup>3</sup> and was aware that the disposition made by him was in breach of trust<sup>4</sup>.

- 1 As to the exercise of trust functions by agents generally see the Trustee Act 2000 Pt IV (ss 11-27); and **TRUSTS** vol 48 (2007 Reissue) PARA 989 et seq.
- 2 *Gray v Johnston* (1868) LR 3 HL 1; *Bank of New South Wales v Goulburn Valley Butter Co Pty Ltd* [1902] AC 543, PC; and see *Union Bank of Australia Ltd v Murray-Aynsley* [1898] AC 693, HL. As to breach of trust generally see **TRUSTS** vol 48 (2007 Reissue) PARAS 1084-1138.
- 3 *Williams v Williams* (1881) 17 ChD 437; *Re Gross, ex p Kingston* (1871) 6 Ch App 632. A fortiori, knowledge of a trust is not to be imputed to an agent such as a solicitor merely because it is claimed against his client that there is a trust: *Carl Zeiss Stiftung v Herbert Smith & Co (a firm) (No 2)* [1969] 2 Ch 276, [1969] 2 All ER 367, CA.
- 4 *Magnus v Queensland National Bank* (1888) 37 ChD 466, CA; and contrast *Coleman v Bucks and Oxon Union Bank* [1897] 2 Ch 243. The fact that a personal benefit to the agent is designed or stipulated for is strong evidence that the agent is privy to the breach of trust: *Gray v Johnston* (1868) LR 3 HL 1. See further **TRUSTS** vol 48 (2007 Reissue) PARA 703.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/7. RELATIONS BETWEEN AGENT AND THIRD PERSONS/(2) RIGHTS OF AGENT/(i) Enforcement of Contract/167. Right to enforce contract.



## (2) RIGHTS OF AGENT

### (i) Enforcement of Contract

#### 167. Right to enforce contract.

Any person who makes a contract in his own name without disclosing the existence of a principal<sup>1</sup>, or who, though disclosing the fact that he is acting as an agent on behalf of a principal, renders himself personally liable on the contract<sup>2</sup>, is entitled to enforce it against the other contracting party<sup>3</sup>, notwithstanding that the principal has renounced the contract<sup>4</sup>. A similar right appears to exist where the agent purports to contract as agent only for an unnamed principal who in fact is non-existent<sup>5</sup>. But where he names his principal and makes the contract expressly as agent<sup>6</sup> on his behalf, he cannot enforce it<sup>7</sup>, even though he is the real principal<sup>8</sup>, unless the other party has affirmed the contract with knowledge of the fact<sup>9</sup>. Where an agent signatory seeks to add himself to the existing named principals as a party to the contract, he can do so if he was one of the principals at the relevant time<sup>10</sup>.

An agent cannot sue for a promised bribe, even though he was not influenced thereby in the discharge of his duty to his principal<sup>11</sup>.

In a claim brought by an agent on his principal's contract, the defendant is entitled to discovery from the principal as fully as if he were the claimant on the record, even though he is a foreign principal<sup>12</sup>.

1 *Sims v Bond* (1833) 5 B & Ad 389. See eg *Craig & Co v Blackater* 1923 SC 472, Ct of Sess.

2 *Short v Spackman* (1831) 2 B & Ad 962; *Cooke v Wilson* (1856) 1 CBNS 153; *Agacio v Forbes* (1861) 14 Moo PCC 160; *Sargent v Morris* (1820) 3 B & Ald 277. See also *Harper & Co v Vigers Bros* [1909] 2 KB 549; *H O Brandt & Co v H N Morris & Co Ltd* [1917] 2 KB 784, CA; cf *N and J Vlassopoulos Ltd v Ney Shipping Ltd, The Santa Carina* [1977] 1 Lloyd's Rep 478, CA. See also PARA 157.

3 *Fisher v Marsh* (1865) 6 B & S 411. He must sue on his own behalf and he will have no claim in the alleged capacity of trustee for his principals: *Allen v F O'Hearn & Co* [1937] AC 213, [1936] 3 All ER 828, PC. See also *Braymist Ltd v Wise Finance Co Ltd* [2002] EWCA Civ 127, [2002] Ch 273, [2002] 2 All ER 333.

4 *Short v Spackman* (1831) 2 B & Ad 962.

5 *Schmalz v Avery* (1851) 16 QB 655; *Harper & Co v Vigers Bros* [1909] 2 KB 549. These decisions are criticised in *Hill Steam Shipping Co v Hugo Stinnes Ltd* 1941 SC 324, Ct of Sess; but cf *Chapman v Smith* [1907] 2 Ch 97 at 103, where the fact that the person making a lease was therein described 'as agent, hereinafter called the landlord', was held not to prevent the lease operating as a demise of the estate vested in him as mortgagee. It must be clear that the person seeking to enforce the contract was, when entering into the contract, purporting to contract as agent, for example intending to bind a non-existent company and not merely applying his signature as that of the company: *Newborne v Sensolid (Great Britain) Ltd* [1954] 1 QB 45, [1953] 1 All ER 708, CA; see also *Black v Smallwood* (1966) 117 CLR 52, [1966] ALR 744, Aust HC. See further PARA 158.

6 The rules apply to a del credere agent: *Bramwell v Spiller* (1870) 21 LT 672. As to this class of agency see PARA 13.

7 *Fairlie v Fenton* (1870) LR 5 Exch 169; *Bowen v Morris* (1810) 2 Taunt 374, Ex Ch; *Evans v Hooper* (1875) 1 QBD 45, CA; *TP Jorleson & Co and Kahn v London Hardwood Co Ltd* (1913) 110 LT 666. Aliter, where he is an insurance broker (*Provincial Insurance Co of Canada v Leduc* (1874) LR 6 PC 224), or an agent with a special interest in the subject matter of the contract (see PARA 168).

8 *Bickerton v Burrell* (1816) 5 M & S 383.

9 *Rayner v Grote* (1846) 15 M & W 359.

10 *Fraser v Thames Television Ltd* [1984] QB 44, [1983] 2 All ER 101.

11 *Harrington v Victoria Graving Dock Co* (1878) 3 QBD 549.

12 *Willis & Co v Baddeley* [1892] 2 QB 324, CA; *James Nelson & Sons Ltd v Nelson Line (Liverpool) Ltd* [1906] 2 KB 217, CA; but see *Queen of Portugal v Glyn* (1840) 7 Cl & Fin 466, HL.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/7. RELATIONS BETWEEN AGENT AND THIRD PERSONS/(2) RIGHTS OF AGENT/(i) Enforcement of Contract/168. Loss of right to enforce contract.

### **168. Loss of right to enforce contract.**

Where an agent is entitled to sue upon a contract made by him, his right is lost by the intervention of his principal<sup>1</sup>, and is subject to any settlement with the principal<sup>2</sup>. An agent who has a special interest in the subject matter of the contract<sup>3</sup> may enforce it<sup>4</sup>, notwithstanding any settlement with the principal<sup>5</sup>, unless the agent has not been prejudiced by the settlement<sup>6</sup>, or unless he is estopped from setting up his interest against the other contracting party<sup>7</sup>.

1 *Atkinson v Cotesworth* (1825) 3 B & C 647; *Sadler v Leigh* (1815) 4 Camp 195.

2 *Rogers v Hadley* (1863) 2 H & C 227; *Thornton v Maynard* (1875) LR 10 CP 695.

3 He is as a factor or auctioneer (*Gray v Pearson* (1870) LR 5 CP 568), but not a broker (*Fairlie v Fenton* (1870) LR 5 Exch 169), nor an agent to whom a principal has indorsed a bill of lading in respect of goods comprised therein (*Burgos v Nascimento* (1908) 100 LT 71).

4 *Williams v Millington* (1788) 1 Hy Bl 81; *Drinkwater v Goodwin* (1775) 1 Cowp 251.

5 *Robinson v Rutter* (1855) 4 E & B 954; *Atkyns and Batten v Amber* (1796) 2 Esp 491; *Isberg v Bowden* (1853) 8 Exch 852; *Manley & Sons Ltd v Berkett* [1912] 2 KB 329.

6 *Grice v Kenrick* (1870) LR 5 QB 340; *Holmes v Tutton* (1855) 5 E & B 65; cf *Manley & Sons Ltd v Berkett* [1912] 2 KB 329.

7 *Coppin v Walker* (1816) 7 Taunt 237.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/7. RELATIONS BETWEEN AGENT AND THIRD PERSONS/(2) RIGHTS OF AGENT/(ii) Recovery of Money Paid/169. Money had and received.

### **(ii) Recovery of Money Paid**

#### **169. Money had and received.**

An agent who has paid money on behalf of his principal to a third person under such circumstances<sup>1</sup> that the principal, if the payment had been made by him, would have been entitled to recover the money, may bring a claim in his own name for money had and received against the third person<sup>2</sup>.

1 He is as mistake of fact (*Colonial Bank v Exchange Bank of Yarmouth, Nova Scotia* (1885) 11 App Cas 84, PC), or fraud (*Holt v Ely* (1853) 1 E & B 795), or extortion (*Stevenson v Mortimer* (1778) 2 Cowp 805); see also *Royal Securities Corp'n Ltd v Montreal Trust Co* [1967] 1 OR 137, 59 DLR (2d) 666 (affd [1967] 2 OR 200, 63 DLR (2d) 15, Ont CA). It is immaterial whether the principal authorised the payment or not: *Holt v Ely*.

2 The claim may be brought either by the principal or by the agent: *Holt v Ely* (1853) 1 E & B 795.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/8. TERMINATION OF AGENCY/(1) IN GENERAL/170. How terminated.

## **8. TERMINATION OF AGENCY**

### **(1) IN GENERAL**

#### **170. How terminated.**

Agency may be terminated either by the act of the parties or by operation of law. The act of the parties may be an agreement between them or acts amounting to a revocation by the principal or a renunciation by the agent<sup>1</sup>.

The law terminates the agency:

- 33 (1) on the expiration of the time, if any, agreed upon<sup>2</sup>;
- 34 (2) on complete performance of the undertaking<sup>3</sup>;
- 35 (3) on frustration of the contract or the happening of an event rendering the continuance of the agency unlawful<sup>4</sup>; or
- 36 (4) where either party becomes incapable of continuing the contract by reason of death, bankruptcy or unsoundness of mind<sup>5</sup>.

The termination of agency by these various events is, however, subject to qualifications either defined by law, or due to the facts of the particular case<sup>6</sup>.

Where an agent goes into administrative receivership, the cessation of its business does not automatically bring its agency agreement with its principal to an end<sup>7</sup>.

1 See PARAS 177-182, 185.

2 See PARA 186.

3 See PARA 187.

4 See PARA 187.

5 See PARAS 188-191.

6 As to irrevocable authorities see PARAS 171-176.

7 *Triffit Nurseries (a firm) v Salads Etcetera Ltd* [2000] 1 All ER (Comm) 737, CA.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/8. TERMINATION OF AGENCY/(2) IRREVOCABLE AUTHORITY/171. Authority coupled with interest.

### **(2) IRREVOCABLE AUTHORITY**

#### **171. Authority coupled with interest.**

Where the agency is created by deed, or for valuable consideration, and the authority is given to effectuate a security or to secure the interest of the agent, the authority cannot be revoked<sup>1</sup>.

Thus, if an agreement is entered into on a sufficient consideration whereby an authority is given for the purpose of securing some benefit to the donee of the authority, the authority is irrevocable on the ground that it is coupled with an interest<sup>2</sup>. So an authority to sell in consideration of forbearance to sue for previous advances<sup>3</sup>, an authority to apply for shares to be allotted on an underwriting agreement, a commission being paid for the underwriting<sup>4</sup>, and an authority to receive rents until the principal and interest of a loan have been paid off<sup>5</sup> or to receive money from a third party in payment of a debt<sup>6</sup>, have been held to be irrevocable. On the other hand, an authority is not irrevocable merely because the agent has a special property in or a lien upon goods to which the authority relates, the authority not being given for the purpose of securing the claims of the agent<sup>7</sup>.

1 As to what will amount to an authority coupled with an interest so as to be irrevocable see *Smart v Sandars* (1848) 5 CB 895. As to irrevocable powers of attorney see PARA 175.

2 *Smart v Sandars* (1848) 5 CB 895 per Wilde CJ. See also *Walsh v Whitcomb* (1797) 2 Esp 565; *Gausson v Morton* (1830) 10 B & C 731; *De Comas v Prost and Kohler* (1865) 3 Moo PCCNS 158; *Kiddill v Farnell* (1857) 3 Sm & G 428; but see *Watson v King* (1815) 4 Camp 272.

3 *Raleigh v Atkinson* (1840) 6 M & W 670.

4 *Re Hannan's Empress Gold Mining and Development Co, Carmichael's Case* [1896] 2 Ch 643, CA; *Re Olympic Fire and General Reinsurance Co* [1920] 2 Ch 341, CA; but cf *Re Consort Deep Level Gold Mines Ltd, ex p Stark* [1897] 1 Ch 575, CA.

5 *Abbott v Stratton* (1846) 9 I Eq R 233; *Spooner v Sandilands* (1842) 1 Y & C Ch Cas 390.

6 *Alley v Hotson* (1815) 4 Camp 325. See also *Re Rose, ex p Hasluck and Garrard* (1894) 1 Mans 218, DC; *Gurnell v Gardner* (1863) 4 Giff 626; *Lepard v Vernon* (1813) 2 Ves & B 51; and *Re Bultfontein Sun Diamond Mine Ltd, ex p Cox, Hughes and Norman* (1897) 75 LT 669, CA.

7 *Taplin v Florence* (1851) 10 CB 744; *Chinnock v Sainsbury* (1860) 30 LJ Ch 409; and see *Frith v Frith* [1906] AC 254, PC.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/8. TERMINATION OF AGENCY/(2) IRREVOCABLE AUTHORITY/172. Agent becoming personally liable.

## 172. Agent becoming personally liable.

Where, in pursuance of his authority, the agent has contracted a personal liability, the principal cannot revoke the authority so as to destroy the agent's right of indemnity in respect of such liability, nor can the trustee in bankruptcy of the principal do so<sup>1</sup>. Similarly, where the agent has incurred a contractual liability to pay money to a third party and the principal subsequently forbids the payment, the agent is entitled to be indemnified in respect of any payments he makes<sup>2</sup>.

1 *Crowfoot v Gurney* (1832) 9 Bing 372; *Walker v Rostron* (1842) 9 M & W 411; *Hutchinson v Heyworth* (1838) 9 Ad & El 375; *Dickinson v Marrow* (1845) 14 M & W 713; *Griffin v Weatherby* (1868) LR 3 QB 753.

2 *Hodgson v Anderson* (1825) 3 B & C 842; *Hamilton v Spottiswoode* (1849) 4 Exch 200; *Metcalf v Clough* (1828) 6 LJOS KB 281; *Yates v Hoppe* (1850) 9 CB 541; *Chappell v Bray* (1860) 6 H & N 145.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/8. TERMINATION OF AGENCY/(2) IRREVOCABLE AUTHORITY/173. Agent liable to personal loss.

### 173. Agent liable to personal loss.

Where liability to personal loss, though not amounting to a legal liability, has been incurred by the agent in the exercise of his authority, as, for example, by the operation of the rules of the Stock Exchange which are binding upon the members, or by a solicitor incurring liability for barrister's fees<sup>1</sup>, the principal cannot revoke the authority after the liability has been incurred<sup>2</sup>.

Illustrations of this rule are frequent in the case of betting transactions<sup>3</sup>.

1 *Rhodes v Fielder, Jones and Harrison* (1919) 89 LJKB 15, DC.

2 *Seymour v Bridge* (1885) 14 QBD 460.

3 *Read v Anderson* (1884) 13 QBD 779, CA; *H W Franklin & Co v Dawson* (1913) 29 TLR 479.

### UPDATE

### 173 Agent liable to personal loss

NOTE 3--See *Temple Legal Protection Ltd v QBE Insurance (Europe) Ltd* [2009] EWCA Civ 453, [2010] 1 All ER (Comm) 703.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/8. TERMINATION OF AGENCY/(2) IRREVOCABLE AUTHORITY/174. Agent acquiring rights in subject matter.

### 174. Agent acquiring rights in subject matter.

Where the agent is entitled to sue on a contract and to a lien on the subject matter, the right to sue is not revocable by the act of bankruptcy of the principal until the claim secured by the lien is satisfied<sup>1</sup>.

A factor's authority to sell, however, is not irrevocable merely because he has made advances on the goods to his principal. The making of advances may, however, be a good consideration for an irrevocable authority to sell, provided that there is an agreement to that effect; such an agreement may be inferred from the circumstances<sup>2</sup>.

1 *Drinkwater v Goodwin* (1775) 1 Cowp 251; *Robson v Kemp* (1802) 4 Esp 233.

2 *De Comas v Prost and Kohler* (1865) 3 Moo PCCNS 158; *Smart v Sandars* (1848) 5 CB 895.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/8. TERMINATION OF AGENCY/(2) IRREVOCABLE AUTHORITY/175. Powers of attorney.

### 175. Powers of attorney.

Where a power of attorney is expressed to be irrevocable and is given to secure a proprietary interest of the donee or the performance of an obligation owed to the donee, the power is irrevocable either by the donor without the consent of the donee or by the death, incapacity, bankruptcy, winding up or dissolution of the donor, so long as the donee has the interest or the obligation remains undischarged<sup>1</sup>. A power of attorney given to secure a proprietary interest

may be given to the person entitled to the interest and persons deriving title under him to that interest, and those persons will be the duly constituted donees of the power for all the purposes of the power, without prejudice to any right to appoint substitutes given by the power<sup>2</sup>.

Provision is also made enabling a person to appoint an attorney whose authority will not be revoked by the donor's mental incapacity<sup>3</sup>.

1 Powers of Attorney Act 1971 s 4(1). Section 4 applies to powers of attorney whenever created: s 4(3).

2 Powers of Attorney Act 1971 s 4(2); and see note 1. As to the protection of persons dealing with the donee of a power expressed to be irrevocable and given by way of security see PARA 193.

3 See the Mental Capacity Act 2005 ss 9-14, 66, Sch 4, Sch 5 Pt 2; the Enduring Powers of Attorney Act 1985 (repealed); and PARAS 194-238.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/8. TERMINATION OF AGENCY/(2) IRREVOCABLE AUTHORITY/176. Agency for fixed time.

### **176. Agency for fixed time.**

Where an agency is created for a fixed time, any right of the principal, as between himself and the agent, to terminate it before the expiration of the time agreed upon must be ascertained from the terms of the agreement<sup>1</sup> and the facts of the particular case<sup>2</sup>. The taking of a bribe has been held to be good ground for termination of the agency<sup>3</sup>, and so has a breach of confidence by the disclosure of confidential information<sup>4</sup>, and the common defences of incompetence or negligence would avail on a claim for wrongful dismissal<sup>5</sup>.

1 *Lazarus v Cairn Line of Steamships Ltd* (1912) 106 LT 378; *Re An Indenture, Sir Herbert Marshall & Sons Ltd v John Brinsmead & Sons Ltd* (1912) 106 LT 460; *Reigate v Union Manufacturing Co (Ramsbottom) Ltd* [1918] 1 KB 592, CA. As to remuneration in respect of transactions after termination see PARA 107; and as to the effect of termination of the business of the principal see PARA 183.

2 *Burton v Great Northern Rly Co* (1854) 9 Exch 507; *Aspdin v Austin* (1844) 5 QB 671; *Dunn v Sayles* (1844) 5 QB 685; *Williamson v Taylor* (1843) 5 QB 175; *Emmens v Elderton* (1853) 4 HL Cas 624; *Eley v Positive Government Security Life Assurance Co Ltd* (1875) 1 ExD 20 (where a solicitor was appointed by articles of association, and it was held that the articles were an agreement *inter socios* and not a contract with third parties). See also *Lothian v Jenolite Ltd* 1969 SC 111 (termination not justifiable on grounds of agent acting for competitors, in absence of implied term prohibiting such action).

3 *Boston Deep Sea Fishing and Ice Co v Ansell* (1888) 39 ChD 339, CA; *Bulfield v Fournier* (1894) 11 TLR 62 (affd (1895) 11 TLR 282, CA).

4 *LS Harris Trustees Ltd v Power Packing Services (Hermit Road) Ltd* [1970] 2 Lloyd's Rep 65 (agency for single transaction).

5 For a discussion of these defences see **EMPLOYMENT** vol 40 (2009) PARA 701.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/8. TERMINATION OF AGENCY/(3) TERMINATION BY ACT OF PARTIES/177. Modes of termination of agencies for an indefinite term.

### **(3) TERMINATION BY ACT OF PARTIES**

### 177. Modes of termination of agencies for an indefinite term.

As in the case of any other contract, subject to the cases of irrevocable authority previously mentioned<sup>1</sup>, agency could, in principle, be freely terminated at common law by the parties either by agreement, or by revocation by the principal on notice or summarily<sup>2</sup>, or by the agent renouncing his authority<sup>3</sup>. In relation to free termination it is necessary to distinguish between fixed term and indefinite term contracts. Fixed term agencies<sup>4</sup> end with the expiry of the term specified. If an agency is entered into for the performance of a specific task by the agent, it will expire on performance of that task. In such cases, no notice need be given by either party. A principal can also terminate an agency contract for breach on the part of the agent. However, the courts will be reluctant to hold that trivial breaches on the part of the agent justify termination<sup>5</sup>, so the contract should spell out clearly events which entitle the principal to terminate<sup>5</sup>. Similarly, the agent may be entitled to terminate for breach on the part of the principal.

In relation to commercial agents<sup>6</sup>, where a fixed term contract is continued by both parties after the expiry of the term, it is deemed to be converted into an agency contract for an indefinite term<sup>7</sup>. An indefinite term agency contract<sup>8</sup> can only be terminated by notice<sup>9</sup> for the specified period<sup>10</sup>. Specific provision is also made regarding the entitlement of commercial agents to compensation or indemnity where the agency is brought to an end<sup>11</sup>.

1 See PARAS 171-176.

2 See PARAS 181-182, 184.

3 See PARA 185. For a discussion of methods of termination at common law see *Crean v Deane* [1959] IR 347.

4 The period of time may be specified, or implied by trade usage: see *Dickinson v Lilwal* (1815) 4 Camp 279.

5 See *Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235, [1973] 2 All ER 39, HL.

6 The commercial agents to whom the Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053 apply. As to the meaning of 'commercial agent', and as to the cases to which the Regulations apply, see PARA 72.

The Regulations do not affect the application of any enactment or rule of law (see the text and notes 1-5) which provides for the immediate termination of the agency contract because of the failure of one party to carry out all or part of his obligations under that contract, or where exceptional circumstances arise: reg 16.

7 Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 14.

8 This applies also to fixed period agency contracts that are converted into agency contracts of an indefinite period under the Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 14 (see the text and notes 6-7): reg 15(5).

9 Notice can be served by either party on the other by delivery, leaving it at his proper address addressed to him, by post addressed to his registered address or to the address of his registered or principal office, or by any other means provided for in the agency contract: Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 22(1). In the case of a corporation it can be served on the secretary or clerk, and in the case of a partnership, on any partner having control over the management of the partnership: reg 22(2).

10 Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 15(1). These periods are: one month for the first year of the contract (reg 15(2)(a)); two months for the second year commenced (reg 15(2)(b)); and, three months for the third year commenced and for subsequent years (reg 15(2)(c)). The parties may agree longer periods, but not shorter ones, and where a longer period is agreed, the period of notice to be observed by the principal must not be shorter than that to be observed by the commercial agent: reg 15(2), (3). Unless otherwise agreed by the parties, the period of notice must coincide with the end of a calendar month: reg 15(4).

11 See PARA 178.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/8. TERMINATION OF AGENCY/(3) TERMINATION BY ACT OF PARTIES/178. Entitlement of commercial agent to compensation or indemnity on termination of agency.

### **178. Entitlement of commercial agent to compensation or indemnity on termination of agency.**

After termination of an agency contract<sup>1</sup>, a commercial agent<sup>2</sup> is entitled to indemnity or compensation, as described below<sup>3</sup>. The parties are free to agree which compensation right applies, but in the absence of agreement, the agent is entitled to be compensated rather than indemnified<sup>4</sup>.

Irrespective of a breach on the part of the principal<sup>5</sup>, the commercial agent is entitled to an indemnity if and to the extent that:

- 37 (1) he has brought the principal new customers<sup>6</sup> or has significantly increased the volume of business with existing customers and the principal continues to derive substantial benefits from the business with such customers<sup>7</sup>; and
- 38 (2) the payment of this indemnity is equitable having regard to all the circumstances and, in particular, the commission lost by the commercial agent on the business transacted with such customers<sup>8</sup>.

The amount of the indemnity must not exceed a figure equivalent to an indemnity for one year calculated from the commercial agent's average annual remuneration over the preceding five years and if the contract goes back less than five years the indemnity must be calculated on the average for the period in question<sup>9</sup>.

The grant of an indemnity does not prevent the commercial agent from seeking damages<sup>10</sup>, but payment of compensation or indemnity is excluded if:

- 39 (a) the principal has terminated the agency contract because of default attributable to the agent which would justify immediate termination<sup>11</sup>;
- 40 (b) the commercial agent has himself terminated the contract<sup>12</sup>; or
- 41 (c) the commercial agent with the agreement of the principal assigns his rights and duties under the contract to another person<sup>13</sup>.

The right to compensation or indemnity will also be lost if the agent fails to claim it within one year<sup>14</sup>. The parties may not derogate from these rights to the detriment of the commercial agent before the agency contract expires<sup>15</sup>.

1 In *Moore v Piretta PTA Ltd* [1999] 1 All ER 174, 'agency contract' was held to mean the whole agency relationship. The Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 17 (see the text and notes 2-15) applies to a contract which has expired by effluxion of time: *Tigana Ltd v Decoro Ltd* [2003] EWHC 23 (QB), [2003] All ER (D) 09 (Feb). Entitlement to indemnity or compensation under these provisions also arises where the agency contract is terminated as a result of the death of the commercial agent: Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 17(8).

2 I.e. commercial agents to whom the Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, apply. As to the meaning of 'commercial agent', and as to the cases to which the Regulations apply, see PARA 72.

3 See the Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 17(1); the text and notes 4-15; and PARA 179. EC Council Directive 86/653 (OJ L382, 31.12.86, p 17) on the coordination of the laws of the member states relating to self-employed commercial agents, which is implemented by the Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, requires member states to confer either a right of



compensation or a right of indemnity in cases of termination (see art 17): however the Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, confer both rights, leaving the parties free to agree which right will apply (although in the absence of agreement the right to compensation takes precedence) (see reg 17). The right of compensation is based on the French system (which does not exactly correspond to the English notion of damages for loss) and the courts accordingly have regard to French law in applying this principle (see *AMB Imballaggi Plastici SRL v Pacflex Ltd* [1999] 2 All ER (Comm) 249, CA; *Roy v MR Pearlman Ltd* [1999] 2 CMLR 1155, Ct of Sess; and *King v T Tunnock Ltd* [2000] IRLR 569, Ct of Sess). The right of indemnity is based on the German system and the courts have regard to German law accordingly (see *Moore v Piretta PTA Ltd* [1999] 1 All ER 174).

4 Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 17(2) (amended by SI 1998/2868). As to the determination of the level of compensation payable see *Lonsdale (t/a Lonsdale Agencies) v Howard & Hallam Ltd* [2007] UKHL 32, [2007] 4 All ER 1, [2007] IRLR 825.

5 See *Moore v Piretta PTA Ltd* [1999] 1 All ER 174. It is unclear whether or not the right to compensation or indemnity arises in the case of closure or liquidation of the principal's business. At common law, this would depend on whether cessation of the principal's business is a repudiation of the contract (see eg cases on employees, such as *Thomas Marshall (Exports) Ltd v Guinle* [1979] Ch 227, [1978] 3 All ER 193; *Gunton v Richmond-upon-Thames London Borough Council* [1981] Ch 448, [1980] 3 All ER 577). In the case of an involuntary liquidation the matter is likely to be of largely academic interest. In *Page v Combined Shipping and Trading Co Ltd* [1997] 3 All ER 656, CA, it was held that the agent was entitled to compensation or indemnity where the principal closed down a healthy business; this was regarded as circumstances attributable to the principal within head (1) in the text. See also *King v T Tunnock Ltd* [2000] IRLR 569, Ct of Sess.

6 See *Moore v Piretta PTA Ltd* [1999] 1 All ER 174, where the court declined to interpret this as meaning that the agent must have introduced new customers; rather it was equivalent to a requirement that the agent should have been instrumental in obtaining new customers, and that indemnity should be calculated by reference to whether the commercial agent has significantly increased the volume of business of the principal.

7 Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 17(3)(a).

8 Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 17(3)(b). The requirement that the indemnity must be equitable is not equivalent to the duty to mitigate that applies in wrongful dismissal cases; this requirement is only relevant in relation to the goodwill received and no parallel with employment law should be drawn: *Moore v Piretta PTA Ltd* [1999] 1 All ER 174.

9 Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 17(4). This does not require that indemnity be assessed by reference to the year following termination: *Moore v Piretta PTA Ltd* [1999] 1 All ER 174. Indemnity should be calculated with reference to the agency relationship as a whole (see note 1): *Moore v Piretta PTA Ltd*.

10 See the Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 17(5); and PARA 179.

11 Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, regs 17(3), 18(a) (amended by SI 1993/3173) (which refers to immediate termination under the Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 16, as to which see PARA 177 note 6). See *Bell Electric Ltd v Aweco Appliance Systems GmbH* [2002] EWHC 872 (QB), [2002] CLC 1246 (where it was suggested that this provision and the circumstances provided for by the Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 18(b)(i) (see note 12) were the reverse sides of the same coin (affd on other grounds [2002] EWCA Civ 1501, [2003] 1 All ER 344)), and *Cooper v Pure Fishing (UK) Ltd* [2003] EWCA Civ 375, [2004] 2 Lloyd's Rep 518 (a principal cannot be said to have terminated a contract within the meaning of the Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 18(a) where the contract comes to an end simply by the effluxion of time).

12 Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 18(b). Payment of compensation or indemnity is not excluded on these grounds if the termination is justified by circumstances attributable to the principal (reg 18(b)(i)) or on grounds of the age, infirmity or illness of the commercial agent in consequence of which he cannot reasonably be required to continue his activities (reg 18(b)(ii)).

13 Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 18(c).

14 Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 17(9). As to the question of effective notice of intention to pursue see *Hackett v Advanced Medical Computer Systems Ltd* [1999] CLC 160 (letter sent by plaintiff's solicitor failed to state expressly that the plaintiff actually intended to pursue a claim; the court held that it should avoid any requirements of formality as such; the test to be applied is whether a particular communication conveys to the objectively reasonable reader that the agent intends to pursue claims under the Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053). Similarly, the agent need

not specify whether the claim is for compensation or indemnity: *Hackett v Advanced Medical Computer Systems*.

15 Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 19.

## UPDATE

### **178 Entitlement of commercial agent to compensation or indemnity on termination of agency**

NOTE 8--Directive 86/653 art 17(2)(a) (implemented by SI 1993/3053 reg 17(3)) precludes the automatic limitation of the indemnity to which a commercial agent is entitled by the amount of commission lost as a result of the termination of the agency contract, even though the benefits which the principal continue to derive have to be given a higher monetary value: Case C-348/07 *Semen v Deutsche Tamoil GmbH* [2009] 2 All ER (Comm) 243, ECJ.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/8. TERMINATION OF AGENCY/(3) TERMINATION BY ACT OF PARTIES/179. Entitlement of commercial agent to damages on termination of agency.

### **179. Entitlement of commercial agent to damages on termination of agency.**

A commercial agent<sup>1</sup> is entitled to compensation for the damage he suffers as a result of the termination of his relations with his principal<sup>2</sup>. For this purpose such damage is deemed to occur particularly when the termination takes place in either or both of the following circumstances<sup>3</sup>, namely circumstances which:

- 42 (1) deprive the commercial agent of the commission which proper performance of the agency contract would have procured for him whilst providing his principal with substantial benefits linked to the activities of the commercial agent<sup>4</sup>; or
- 43 (2) have not enabled the commercial agent to amortise the costs and expenses that he had incurred in the performance of the agency contract on the advice of his principal<sup>5</sup>.

Compensation will not be payable if:

- 44 (a) the principal has terminated the agency contract because of default attributable to the agent which would justify immediate termination<sup>6</sup>;
- 45 (b) the commercial agent has himself terminated the contract<sup>7</sup>; or
- 46 (c) the commercial agent with the agreement of the principal assigns his rights and duties under the contract to another person<sup>8</sup>.

The right to compensation cannot be derogated from<sup>9</sup>, but it will be lost if the agent fails to claim it within one year<sup>10</sup>.

1     le a commercial agent to whom the Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, apply. As to the meaning of 'commercial agent', and as to the cases to which the Regulations apply, see PARA 72. Regulation 17 (see the text and notes 2-10) applies to a contract which has expired by effluxion of time: *Tigana Ltd v Decoro Ltd* [2003] EWHC 23 (QB), [2003] All ER (D) 09 (Feb). Entitlement to indemnity or compensation under these provisions also arises where the agency contract is terminated as a result of the death of the commercial agent: Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg

17(8). See also, as to a commercial agent's entitlement to compensation and indemnity on the termination of the agency, PARA 178.

2 Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 17(6). As to the courts' approach in applying this principle see *AMB Imballaggi Plastici SRL v Pacflex Ltd* [1999] 2 All ER (Comm) 249, CA; *Moore v Piretta PTA Ltd* [1999] 1 All ER 174; *Roy v MR Pearlman Ltd* [1999] 2 CMLR 1155, Ct of Sess; and *King v T Tunnock Ltd* [2000] IRLR 569, Ct of Sess.

In *Duffen v FRA BO SpA* (1998) 17 Tr LR 460, the Court of Appeal upheld a payment in respect of unpaid commission, but disallowed a claim under a liquidated damages clause. Otton LJ observed that since the commercial agent could not rely on the liquidated damages clause, he was entitled to rely on the Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, to augment his common law entitlement. However, this appears to be inconsistent with the rule that the Regulations are mandatory, and cannot be derogated from (see the text and note 9).

See also the observations of Hallgarten J in the consequent proceedings between the parties in the county court ([2000] 1 Lloyd's Rep 180 at 190): compensation must be paid up to the earliest date when the agreement might have expired. The right approach to the evaluation of compensation is to look at the earnings which might have accrued to the claimant during the period to that date.

See also *Barrett McKenzie & Co Ltd v Escada (UK) Ltd* [2001] All ER (D) 78 (Jun), (2001) Times, 15 May.

3 Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 17(7). These provisions do not limit the amount of compensation payable; cf the position with regard to indemnity (see reg 17(4); PARA 178).

4 Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 17(7)(a).

5 Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 17(7)(b).

6 Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 18(a) (amended by SI 1993/3173) (which refers to immediate termination under the Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 16, as to which see PARA 177 note 6). See further PARA 178 note 11.

7 Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 18(b). Payment of compensation is not excluded on these grounds if the termination is justified by circumstances attributable to the principal (reg 18(b)(i)) or on grounds of the age, infirmity or illness of the commercial agent in consequence of which he cannot reasonably be required to continue his activities (reg 18(b)(ii)).

8 Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 18(c).

9 Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 19.

10 Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 17(9). See further PARA 178 note 14.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/8. TERMINATION OF AGENCY/(3) TERMINATION BY ACT OF PARTIES/180. Restraint of trade clauses in commercial agency contracts.

### **180. Restraint of trade clauses in commercial agency contracts.**

An agreement restricting the business activities of a commercial agent<sup>1</sup> following termination of the agency contract<sup>2</sup> is valid only if and to the extent that it is concluded in writing and relates to the geographical area or the group of customers and the geographical area entrusted to the commercial agent and to the kind of goods covered by his agency under the contract<sup>3</sup>. A restraint of trade clause may be valid for not more than two years after termination of the agency contract<sup>4</sup>.

<sup>1</sup> I.e. a commercial agent to whom the Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, apply. As to the meaning of 'commercial agent', and as to the cases to which the Regulations apply, see PARA 72.

2 le a 'restraint of trade clause': Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 2(1). As to restraint of trade generally see **COMPETITION** vol 18 (2009) PARA 377 et seq. Nothing in reg 20 (see the text and notes 3-4) affects any enactment or rule of law which imposes other restrictions on the validity or enforceability of restraint of trade clauses or which enables a court to reduce the obligations on the parties resulting from such clauses: reg 20(3). For an example of a clause in an agency contract held to be in restraint of trade, and consequently severable, see *Marshall v NM Financial Management Ltd* [1995] 4 All ER 785, [1995] 1 WLR 1461 (affd [1997] 1 WLR 1527, [1997] ICR 1065, CA).

In *Moore v Piretta PTA Ltd* [1999] 1 All ER 174, 'agency contract' was held to mean the whole agency relationship.

3 Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 20(1).

4 Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 20(2).

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/8. TERMINATION OF AGENCY/(3) TERMINATION BY ACT OF PARTIES/181. Revocation by notice.

### **181. Revocation by notice.**

Except in relation to certain commercial agents<sup>1</sup>, notice of revocation may be given at any time before the authority is wholly exercised<sup>2</sup>, subject to any right to damages on the part of the agent for breach of contract<sup>3</sup>.

An authority is not deemed to be exercised, so as to prevent revocation, merely because a preliminary step has been taken which does not bind either principal or agent; for example, where an insurance broker has given instructions for a marine insurance policy the presentation of the slip by the broker merely constitutes an offer which an underwriter accepts by 'writing a line'. Up to that point, the agent's authority would, in principle, be revocable<sup>4</sup>. A revocation after partial exercise of the authority will be ineffective<sup>5</sup> unless the authority is severable into parts, so that the unexecuted parts may be countermanded<sup>6</sup>. An estate agent, not being a sole agent, normally contracts on the footing that at any time before earning his commission his principal may refuse to continue with the transaction or may dispose of the property through other agents<sup>7</sup>, and may in some cases do so without notice of revocation<sup>8</sup>.

Money paid to an agent by his principal, under authority to devote it to a specific purpose, is recoverable at any time before that purpose has been carried out<sup>9</sup>, even though paid to abide the event of a wager<sup>10</sup>. Where, however, the principal has given the agent authority to make a payment of money, and a sum has been appropriated under an agreement with the payee<sup>11</sup>, or where the circumstances are such that the payee has obtained an equitable assignment of such sum<sup>12</sup>, the principal cannot afterwards revoke the authority to make such payment.

Where the agency agreement involves a continuing relationship between the parties any express provision in the agreement for termination will prevail<sup>13</sup>. Where the agreement contains no such provision, it is not normally presumed that the parties intended the relationship to endure in perpetuity and a provision for termination by reasonable notice will be implied in cases where the relationship is analogous to that between employer and employee<sup>14</sup>, but, in other cases, the agency agreement may be terminable summarily<sup>15</sup>.

In the case of a commercial agent, termination of an agency contract for an indefinite period is subject to prescribed periods of notice<sup>16</sup>.

1 le commercial agents to whom the Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, apply. As to the meaning of 'commercial agent', and as to the cases to which the Regulations apply, see PARA 72. As to termination of contracts of agency to which the Regulations apply see PARA 177; and the text and notes 13-16.

2 *Warlow v Harrison* (1859) 1 E & E 309 (auctioneer's authority may be revoked at any time before the fall of the hammer); *Crean v Deane* [1959] IR 347 (recovery of stake money of backers of contest where game uncompleted); *Farmer v Robinson* (1805) 2 Camp 339n; *Manser v Back* (1848) 6 Hare 443; *Doward, Dickson & Co v Williams & Co* (1890) 6 TLR 316; *Alexander v Davis & Co* (1885) 2 TLR 142; *Bovine Ltd v Dent and Wilkinson* (1904) 21 TLR 82; *Barrett v Gilmour & Co* (1901) 6 Com Cas 72; *Re Hare and O'More's Contract* [1901] 1 Ch 93; *Freeman v Fairlie* (1838) 8 LJ Ch 44.

3 *Toppin v Healey* (1863) 1 New Rep 326; *Turner v Goldsmith* [1891] 1 QB 544, CA; *Taylor v Caldwell* (1863) 3 B & S 826.

4 *General Reinsurance Corp v Forsakringsaktiebolaget Fennia Patria* [1983] QB 856, [1983] 3 WLR 318, CA.

5 *Day v Wells* (1861) 30 Beav 220; *Rhodes v Fielder, Jones and Harrison* (1919) 89 LJB 15, DC.

6 *Bristow and Porter v Taylor* (1817) 2 Stark 50.

7 *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108, [1941] 1 All ER 33, HL; see further PARA 103.

8 *EP Nelson & Co v Rolfe* [1950] 1 KB 139, [1949] 2 All ER 584, CA; see also *Jerome v Bentley & Co* [1952] 2 All ER 114 (agent for sale of jewellery).

9 *Taylor v Lendey* (1807) 9 East 49; *Brummell v M'Pherson* (1828) 5 Russ 263; *Gibson v Minet* (1824) 9 Moore CP 31; *Edgar v Fowler* (1803) 3 East 222; and see *Taylor v Bowers* (1876) 1 QBD 291, CA.

10 *Smith v Bickmore* (1812) 4 Taunt 474; *Hastelow v Jackson* (1828) 8 B & C 221; *Varney v Hickman* (1847) 5 CB 271; *Diggle v Higgs* (1877) 2 ExD 422, CA; *Trimble v Hill* (1879) 5 App Cas 342, PC; *Gatty v Field* (1846) 9 QB 431; *Hampden v Walsh* (1876) 1 QBD 189.

11 *Burn v Carvalho* (1839) 4 My & Cr 690; *Dickinson v Marrow* (1845) 14 M & W 713; *Crowfoot v Gurney* (1832) 9 Bing 372.

12 *Robertson v Fauntleroy* (1823) 8 Moore CP 10; *Fisher v Miller* (1823) 7 Moore CP 527; *Walker v Rostron* (1842) 9 M & W 411; *Hutchinson v Heyworth* (1838) 9 Ad & El 375; *Chartered Bank of India, Australia and China v Evans* (1869) 21 LT 407, PC.

13 Cf, as to the minimum periods of notice applicable to employees under contracts of service, the Employment Rights Act 1996 ss 86, 210, 211; **EMPLOYMENT** vol 39 (Reissue) PARA 105; **EMPLOYMENT** vol 40 (2009) PARAS 692-693.

14 See *Llanelly Rly and Dock Co v London and North Western Rly Co* (1873) 8 Ch App 942; affd (1875) LR 7 HL 550. See also *Martin-Baker Aircraft Co Ltd v Canadian Flight Equipment Ltd, Martin-Baker Aircraft Co Ltd v Murison* [1955] 2 QB 556, [1955] 2 All ER 722.

15 See PARA 184.

16 See PARA 177.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/8. TERMINATION OF AGENCY/(3) TERMINATION BY ACT OF PARTIES/182. Mode of revocation.

## 182. Mode of revocation.

Revocation need not necessarily be by formal instrument. A deed may be revoked by word of mouth<sup>1</sup>, or the principal may intervene in the course of negotiations<sup>2</sup>, but until some such action of the principal is taken the agent is justified in assuming the continuance of the agency<sup>3</sup>.

1 *The Margaret Mitchell* (1858) 4 Jur NS 1193; *R v Wait* (1823) 11 Price 518.

2 *Atkinson v Cotesworth* (1825) 3 B & C 647.

3 *Re Oriental Bank Corpn, ex p Guillemin* (1884) 28 ChD 634. The agent may, however, incur personal liability to the third party for breach of warranty of authority where he continues to act after a revocation by operation of law, on the death or mental incapacity of the principal (see PARA 188), or bankruptcy of the principal (see PARA 190). As to warranty of authority see PARAS 160-161. As to revocation by termination of the business of the principal see PARA 183.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/8. TERMINATION OF AGENCY/(3) TERMINATION BY ACT OF PARTIES/183. Termination of principal's business.

### **183. Termination of principal's business.**

Where an agency has been created for a fixed period, the question whether the agent is entitled to claim damages on cessation of the principal's business before the end of that period for wrongful revocation of the agency depends upon whether there was any obligation, express or implied, on the part of the principal to continue his business to the end of that period<sup>1</sup>. This can only be determined from the circumstances of each particular case<sup>2</sup>, and the express words of the particular agency agreement; a term will only be implied if it is strictly necessary to give business efficacy to the contract, and it will not be implied merely because the court thinks it is a reasonable term<sup>3</sup>.

An agreement, for a definite time, by an agent to act as agent and by a principal to remunerate the agent by a commission on business effected by the agent in connection with the principal's business, does not impose a necessary implication that the principal's business must be continued during that period<sup>4</sup>. This implication may, however, arise where there is an active obligation upon the principal to do something to enable the agent to earn his commission<sup>5</sup>. There may also be an implication that the principal must not by terminating the agreement deprive the agent of the fruits of his labour<sup>6</sup>.

When there is an express term which casts upon the principal an obligation to continue the business, no term will be implied that the agent's rights are to cease upon events for which no provision has been made<sup>7</sup>. Where there is such an obligation, liability will not be escaped by the voluntary winding up of a company<sup>8</sup>, or the dissolution of a partnership firm<sup>9</sup>, constituting the principal; but, if there was no such obligation, then the winding up of a company or dissolution of a partnership firm constituting the principal will put an end to the contract of agency<sup>10</sup>, unless (in the case of a partnership) the contract was not of a personal character<sup>11</sup>.

Where there is an agreement for a fixed period, it will not lawfully be terminated, so as to exclude the right to damages, by the principal discontinuing the business on the ground of its unprofitable character<sup>12</sup>, or in consequence of the principal ceasing to carry on business under agreement with competitors<sup>13</sup>.

The application of the rules described above to commercial agents<sup>14</sup> is unclear<sup>15</sup>.

1 As to termination of the contract by impossibility of performance other than as a result of the act of the parties, where the law treats the contract as frustrated, see PARA 187.

2 *Shackleton Aviation Ltd v Maitland Drewery Aviation Ltd* [1964] 1 Lloyd's Rep 293; *Hamlyn & Co v Wood & Co* [1891] 2 QB 488, CA; *M'Intyre v Belcher* (1863) 14 CBNS 654; *Turner v Goldsmith* [1891] 1 QB 544, CA. See *Page v Combined Shipping and Trading Co Ltd* [1997] 3 All ER 656, CA (damages under the Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 17 (see PARAS 178-179) may reflect level of commission agent would have earned if principal had not terminated contract prematurely).

3 *Hamlyn & Co v Wood & Co* [1891] 2 QB 488, CA; *The Moorcock* (1889) 14 PD 64, CA; *Lazarus v Cairn Line of Steamships Ltd* (1912) 106 LT 378; *L French & Co Ltd v Leeston Shipping Co Ltd* [1922] 1 AC 451, HL. As to damages for the loss of opportunity to earn remuneration see generally PARA 108.

4 *Rhodes v Forwood* (1876) 1 App Cas 256, HL; *Re English and Scottish Marine Insurance Co, ex p Maclure* (1870) 5 Ch App 737, CA; *White v Turnbull, Martin & Co* (1898) 3 Com Cas 183, CA; *Re R S Newman Ltd, Raphael's Claim* [1916] 2 Ch 309, CA; and the cases cited in note 3.

5 *Warren & Co v Agdeshman* (1922) 38 TLR 588; and see *Dowling v Methven, Sons & Co Ltd* 1921 SC 948, Ct of Sess.

6 *Re Patent Floor Cloth Co, Dean and Gilbert's Claim* (1872) 41 LJ Ch 476; *Dowling v Methven, Sons & Co Ltd* 1921 SC 948, Ct of Sess; *L French & Co Ltd v Leeston Shipping Co Ltd* [1922] 1 AC 451, HL.

7 *Turner v Goldsmith* [1891] 1 QB 544, CA; *Ogdens Ltd v Nelson* [1905] AC 109, HL; *Lazarus v Cairn Line of Steamships Ltd* (1912) 106 LT 378.

8 *Re Patent Floor Cloth Co, Dean and Gilbert's Claim* (1872) 41 LJ Ch 476; *Re Imperial Wine Co, Shirreff's Case* (1872) LR 14 Eq 417; *Re London and Scottish Bank, ex p Logan* (1870) LR 9 Eq 149; *Re English and Scottish Marine Insurance Co, ex p Maclure* (1870) 5 Ch App 737, CA; *Reigate v Union Manufacturing Co (Ramsbottom) Ltd* [1918] 1 KB 592, CA.

9 *Rhodes v Forwood* (1876) 1 App Cas 256, HL (agreement for agency for sale of coals for fixed time implied no undertaking to pay damages on sale of the colliery); *Stirling v Maitland* (1864) 5 B & S 840 (the dissolution of an insurance company dissolved the agency agreement); *Northey v Trevillion* (1902) 7 Com Cas 201.

10 *Tasker v Shepherd* (1861) 6 H & N 575; *Salton v New Beeston Cycle Co* [1900] 1 Ch 43; *Friend v Young* [1897] 2 Ch 421.

11 *Phillips v Alhambra Palace Co* [1901] 1 KB 59, DC.

12 *Nielans v Cuthbertson* (1891) 7 TLR 516.

13 *Ogdens Ltd v Nelson* [1905] AC 109, HL; but see *Lazarus v Cairn Line of Steamships Ltd* (1912) 106 LT 378.

14 The commercial agents to whom the Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, apply. As to the meaning of 'commercial agent', and as to the cases to which the Regulations apply, see PARA 72. As to termination of contracts of agency to which the Regulations apply see PARAS 177-179.

15 If the principal dismisses the agent, the normal termination rights under the Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 18(b)(i) (see PARAS 178-179) can be claimed by the agent. As seen above, cessation of the principal's business does not necessarily terminate the contract of agency. However, if in connection with the cessation, the principal failed to satisfy an order, or pay the agent commission, or the like, that would seem to amount to a repudiation on the part of the principal. The agent could accept this repudiation, in which case the agency contract would be terminated, and termination payments could then be claimed under reg 18(b).

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/8. TERMINATION OF AGENCY/(3) TERMINATION BY ACT OF PARTIES/184. Summary termination.

### 184. Summary termination.

An agency created by power of attorney may prima facie be terminated at will<sup>1</sup>. In the case of an agent who is a mere commission agent with no obligation to seek orders for the principal and who is in no other sense 'employed' by the principal, the agency may be terminated summarily<sup>2</sup>.

1 *Bromley v Holland* (1802) 7 Ves 3; *Re Gowett and Leigh, ex p Smither* (1836) 1 Deac 413, Ct of R. As to powers of attorney expressed to be irrevocable and given by way of security, however, see PARA 175. As to the protection of third parties where a power of attorney is revoked see PARA 193.

2 *Motion v Michaud* (1892) 8 TLR 253 (affd 8 TLR 447, CA); *Joynton v Hunt & Son* (1905) 93 LT 470, CA; *Clerk v Laurie* (1857) 2 H & N 199 (as to what amounts to a revocation); *Levy v Goldhill & Co* [1917] 2 Ch 297; *Hampton & Sons Ltd v George* [1939] 3 All ER 627 (termination on appointment of another agent); cf *Barrett v Gilmour & Co* (1901) 6 Com Cas 72; *Sellers v London Counties Newspapers* [1951] 1 KB 784, [1951] 1 All ER

544, CA; and *Martin-Baker Aircraft Co Ltd v Canadian Flight Equipment Ltd*, *Martin-Baker Aircraft Co Ltd v Murison* [1955] 2 QB 556, [1955] 2 All ER 722 (reasonable notice required where the relationship is analogous to master and servant).

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/8. TERMINATION OF AGENCY/(3) TERMINATION BY ACT OF PARTIES/185. Renunciation of authority.

### **185. Renunciation of authority.**

An agent may renounce his authority at any time before completion of the agency, but subject to any claim of his principal for damages for breach of the contract of agency<sup>1</sup>.

<sup>1</sup> *Hochster v De la Tour* (1853) 2 E & B 678; *Balfe v West* (1853) 13 CB 466; *Elsee v Gatward* (1793) 5 Term Rep 143.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/8. TERMINATION OF AGENCY/(4) TERMINATION BY OPERATION OF LAW/186. By effluxion of time.

## **(4) TERMINATION BY OPERATION OF LAW**

### **186. By effluxion of time.**

Termination by operation of law may take place by effluxion of the time which may be fixed for the continuance of the agency by the parties or by custom or usage of the particular trade or business<sup>1</sup>. It is not necessary that the time for the continuance of the agency should be expressly stated. It may be presumed from the nature of the authority; for example, when a power of attorney recited the fact that the donor was about to go abroad, it was held to be impliedly revoked on his return home<sup>2</sup>.

<sup>1</sup> *Dickinson v Lilwall* (1815) 4 Camp 279 (custom for broker's authority to expire with the day); *Seton v Slade* (1802) 7 Ves 265.

<sup>2</sup> *Danby v Coutts & Co* (1885) 29 ChD 500; *Lawford & Co v Harris* (1896) 12 TLR 275 (as to stockbroker's authority); and see *Graham v Manders* (1918) 53 ILT 5.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/8. TERMINATION OF AGENCY/(4) TERMINATION BY OPERATION OF LAW/187. By performance, impossibility or illegality of continuance.

### **187. By performance, impossibility or illegality of continuance.**

The agency may also be terminated by the conclusion of the agency by performance<sup>1</sup>, by frustration of the contract<sup>2</sup>, or by the happening of an event rendering the continuance of the agency unlawful<sup>3</sup>. On completion of the agency by performance the agent is *functus officio*, and has no further authority to bind the principal<sup>4</sup>.



1 *Bell v Balls* [1897] 1 Ch 663 (the performance of the particular duty ends the authority; where an auctioneer signed a memorandum a week after the auction he was held to have no authority). The relationship between a principal and an agent employed to sell property does not end with the introduction of a person willing to buy: *Toulmin v Millar* (1887) 12 App Cas 746, HL; *Keppel v Wheeler* [1927] 1 KB 577, CA; and see *Nightingale v Parsons* [1914] 2 KB 621, CA.

2 As to the discharge of contracts on the ground of impossibility of performance or frustration, and the adjustment of rights and liabilities on frustration, see **CONTRACT** vol 9(1) (Reissue) PARA 888 et seq. As to termination of the business of the principal in circumstances where this does not amount to frustration see PARA 183.

3 *Esposito v Bowden* (1857) 7 E & B 763, Ex Ch (where the outbreak of war avoided a charterparty); *Hugh Stevenson & Sons v Aktiengesellschaft für Cartonnagen-Industrie* [1918] AC 239, HL (where continuance of an agency agreement necessarily involved property of the enemy); *Marshall v Glanville* [1917] 2 KB 87; *Tingley v Müller* [1917] 2 Ch 144, CA. An agency agreement is not avoided or rendered impossible of performance by the agent being a subject of an enemy state while he is allowed to dwell in Great Britain and exempted from internment (*Schostall v Johnson* (1919) 36 TLR 75), or by the temporary internment of the agent (*Nordman v Rayner and Sturges* (1916) 33 TLR 87), or by the agent being in territory under enemy administration (*Hangkam Kwintong Woo v Liu Lan Fong (alias Lui Ah Lan)* [1951] AC 707, [1951] 2 All ER 567, PC), unless the performance of the agency would involve dealings between persons in this country and the enemy during war; cf *V/O Sovfracht v Van Udens Scheepvaart en Agentuur Maatschappij (NV Gebr)* [1943] AC 203, [1943] 1 All ER 76, HL (termination of solicitor's authority).

4 *Blackburn v Scholes* (1810) 2 Camp 341; *Macbeath v Ellis* (1828) 4 Bing 578; *Gillow & Co v Lord Aberdare* (1892) 9 TLR 12, CA; *Seton v Slade* (1802) 7 Ves 265; *Bell v Balls* [1897] 1 Ch 663; *Nightingale v Parsons* [1914] 2 KB 621, CA; and see *Butler v Knight* (1867) LR 2 Exch 109; and *R v Leitrim Justices* [1900] 2 IR 397.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/8. TERMINATION OF AGENCY/(4) TERMINATION BY OPERATION OF LAW/188. Death or mental illness of principal.

### **188. Death or mental illness of principal.**

Except as already stated with regard to irrevocable authorities<sup>1</sup>, the authority of an agent is terminated by the principal's death<sup>2</sup>, or by the principal becoming incapable by reason of mental illness of managing his affairs<sup>3</sup>. The representatives of a deceased principal may, however, ratify a contract made by the agent subsequent to his principal's death if they think fit, though, in the absence of a ratification, they are not bound by it<sup>4</sup>.

Although, if the principal becomes incapable by reason of mental illness, the agency as between the principal and agent is terminated, the agent may continue to bind his principal vis-à-vis a third person dealing with the agent without knowledge of the condition of the principal<sup>5</sup>.

1 See PARAS 171-176.

2 *Blades v Free* (1829) 9 B & C 167 (death of husband determining the implied authority of wife to bind his estate for necessities; as to abolition of a wife's agency of necessity see PARA 24 note 4); *Lepard v Vernon* (1813) 2 Ves & B 51; *Wallace v Cook* (1804) 5 Esp 117; *Whitehead v Lord* (1852) 7 Exch 691; *Pool v Pool* (1889) 58 LJP 67; *Farrow v Wilson* (1869) LR 4 CP 744; *Campanari v Woodburn* (1854) 15 CB 400; *Houstoun v Robertson* (1816) 6 Taunt 448; *Cottle v Aldrich* (1815) 4 M & S 175; *Phillips v Jones* (1888) 4 TLR 401; *Re Overweg*, *Haas v Durant* [1900] 1 Ch 209; *Graham v Jackson* (1845) 6 QB 811; *Bailey v Collett* (1854) 18 Beav 179; *Watson v King* (1815) 1 Stark 121 (even if the authority is coupled with an interest); *Kennedy v Thomassen* [1929] 1 Ch 426; but see *Spooner v Sandilands* (1842) 1 Y & C Ch Cas 390; and see *Carter v White* (1883) 25 ChD 666, CA (distinction between authority and contract).

3 *Drew v Nunn* (1879) 4 QBD 661, CA; *Yonge v Toynbee* [1910] 1 KB 215, CA. The estate of a person of unsound mind may be liable for necessities; see *Re Weaver* (1882) 21 ChD 615, CA; and the Sale of Goods Act 1979 s 3 (see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 37). As to the statutory protection to the donee of a revoked power of attorney where he has no notice of the revocation see PARA 193. A power of attorney may, however, be created which will survive the subsequent mental incapacity of the donor, under the Mental Capacity Act 2005 ss 9-14, 66, Sch 4, Sch 5 Pt 2 and (formerly) the Enduring Powers of Attorney Act 1985 (repealed) (see PARAS 194-238).

4 *Foster v Bates* (1843) 12 M & W 226; *Campanari v Woodburn* (1854) 15 CB 400.

5 *Drew v Nunn* (1879) 4 QBD 661, CA; *Platt v Depree* (1893) 9 TLR 194, where the principal released the representative of the purchaser, who had become insane, and the agent was held entitled to commission. The doctrine of apparent authority would appear to apply. See also *Re Walden, ex p Bradbury* (1839) Mont & Ch 625; *Duke of Beaufort v Glynn* (1856) 3 Sm & G 213 (affd 3 WR 502, CA).

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/8. TERMINATION OF AGENCY/(4) TERMINATION BY OPERATION OF LAW/189. Death or mental illness of agent.

### **189. Death or mental illness of agent.**

The death or, apparently, the incapacity for managing his affairs by reason of mental illness of an agent terminates the agency, which rests on personal relationship<sup>1</sup>. A joint agency is terminated by the death of any one of the joint agents<sup>2</sup>.

1 *Friend v Young* [1897] 2 Ch 421; *Pool v Pool* (1889) 58 LJP 67.

2 *Friend v Young* [1897] 2 Ch 421; *Pool v Pool* (1889) 58 LJP 67.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/8. TERMINATION OF AGENCY/(4) TERMINATION BY OPERATION OF LAW/190. Bankruptcy of principal.

### **190. Bankruptcy of principal.**

Except as stated above<sup>1</sup> with regard to irrevocable authorities, the authority of an agent is, as a general rule, terminated by the bankruptcy of the principal<sup>2</sup>.

Mere formal acts in completion of a transaction already binding on the principal may, however, be performed by the agent under his authority after the principal's bankruptcy<sup>3</sup>. Additionally, the agent and third parties are protected in respect of any property<sup>4</sup> or payment received before the commencement of the bankruptcy<sup>5</sup> but after the presentation of the petition, in good faith, for value and without notice<sup>6</sup> that the petition has been presented; and in respect of any interest in property which derives from an interest thus protected<sup>7</sup>.

In relation to transactions after the bankruptcy order is made, an agent is only protected to a limited extent. If, after the commencement of his bankruptcy, the bankrupt has incurred a debt to a banker or other person by reason of the making of a void payment<sup>8</sup>, that debt is deemed to have been incurred before the commencement of the bankruptcy (and is therefore a valid bankruptcy debt which may be proved in the bankruptcy<sup>9</sup>), unless the banker or other person had notice of the bankruptcy before the debt was incurred or it is not reasonably practicable for the amount of the payment to be recovered from the person to whom it was made<sup>10</sup>.

If the agent has a right of lien on goods of the principal or their proceeds, such right is not affected by the principal's bankruptcy<sup>11</sup>. If there have been mutual credits or dealings between the principal and agent, the agent is entitled to a right of set-off against all money of the principal received before the date of the bankruptcy order provided that no notice of the bankruptcy petition has been given<sup>12</sup>.

1 See PARAS 171-176.

- 2 *Dawson v Sexton* (1823) 1 LJOS Ch 185. This was the rule under the previous law of bankruptcy, and it is likely that the same principle applies under the Insolvency Act 1986. As to bankruptcy see generally **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 1 et seq.
- 3 *Dixon v Ewart* (1817) Buck 94; *Markwick v Hardingham* (1880) 15 ChD 339, CA.
- 4 As to the meaning of 'property' for these purposes see the Insolvency Act 1986 s 436; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 400.
- 5 It is normally the day on which the bankruptcy order is made: see the Insolvency Act 1986 s 278; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 213.
- 6 The onus of proving want of notice rests on the person relying thereon: *Pearson v Graham* (1837) 6 Ad & El 899.
- 7 See the Insolvency Act 1986 s 284(4); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 217. This is an exception to the rule that any disposition of property by the bankrupt between the day of presentation of the petition and the vesting of the bankrupt's estate in a trustee, which was not made with the consent of the court or subsequently ratified by the court, is void: see s 284(1)-(3); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 217. See also *Re MacDonnell, ex p MacDonnell* (1819) Buck 399; *Re Douglas, ex p Snowball* (1872) 7 Ch App 534. The same exception applies in the compulsory winding up of a company where the company's agent has no notice of winding-up proceedings: *Re Oriental Bank Corpn, ex p Guillemin* (1884) 28 ChD 634. As to provisions for notice by advertisement of winding up see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 487. It is submitted that the cases cited above, although decided in relation to acts of bankruptcy (now abolished), are still relevant to the position of an agent in relation to a principal who becomes bankrupt under the Insolvency Act 1986. Most of the cases arising under the previous law related to the authority of solicitors (acting as agents). Consider whether an agent who continues to act after he has had notice that a bankruptcy petition has been presented takes the risk of being held personally liable; cf *Kynaston v Crouch* (1845) 14 M & W 266; *Re Lamb, ex p Gibson and Bolland* (1886) 55 LT 817.
- 8 It is a payment not made with the consent of the court or subsequently ratified by the court: see the Insolvency Act 1986 s 284(1), (2); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 217. If the payment is void, the person paid holds the sum paid for the bankrupt as part of his estate: see s 284(2); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 217.
- 9 As to bankruptcy debts and proving in the bankruptcy see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 490 et seq.
- 10 See the Insolvency Act 1986 s 284(5); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 217.
- 11 *Drinkwater v Goodwin* (1775) 1 Cowp 251.
- 12 See the Insolvency Act 1986 s 323; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 547. See also *Elliott v Turquand* (1881) 7 App Cas 79, PC. It is submitted that this case, although decided in relation to acts of bankruptcy, is still relevant; see note 7. As to what constitutes 'mutual credits' see *Palmer v Day & Sons* [1895] 2 QB 618. The rule does not apply to the case of a sum paid to an agent for a specific purpose: *Re Pollitt, ex p Minor* [1893] 1 QB 455, CA. As to the meaning of 'mutual credits' see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 547.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/8. TERMINATION OF AGENCY/(4) TERMINATION BY OPERATION OF LAW/191. Bankruptcy of agent.

### 191. Bankruptcy of agent.

The bankruptcy of an agent will not as a matter of law terminate the authority of the agent; whether it does so terminate is a question of fact which will depend upon the construction of the agreement<sup>1</sup>. It will not do so where the bankruptcy does not make the agent less fit and competent for the proper performance of his duties<sup>2</sup>, or where the act he is authorised to do is merely a formal one<sup>3</sup>. The effect of the agent ceasing to trade is not to bring the agency to an automatic end, nor to convert the relationship between principal and agent to one of trustee

and beneficiary; accordingly, sums received by the agent are available to the agent's creditors<sup>4</sup>.

1 *McCall v Australian Meat Co Ltd* (1870) 19 WR 188; *Hudson v Granger* (1821) 5 B & Ald 27; *Bailey v Thurston & Co Ltd* [1903] 1 KB 137, CA. Similarly where an agent goes into administrative receivership, the cessation of its business does not automatically bring its agency agreement with its principal to an end: *Triffitt Nurseries (a firm) v Salads Etcetera Ltd* [2000] 1 All ER (Comm) 737, CA.

2 <sup>2</sup> *McCall v Australian Meat Co Ltd* (1870) 19 WR 188; *Hudson v Granger* (1821) 5 B & Ald 27; *Bailey v Thurston & Co Ltd* [1903] 1 KB 137, CA.

3 *Dixon v Ewart* (1817) 3 Mer 322.

4 *Triffitt Nurseries (a firm) v Salads Etcetera Ltd* [2000] 1 All ER (Comm) 737, CA.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/8. TERMINATION OF AGENCY/(5) NOTICE TO THIRD PERSONS/192. Third person led to believe in authority.

## (5) NOTICE TO THIRD PERSONS

### 192. Third person led to believe in authority.

The cases in which notice of termination has been held to be necessary are, in general, cases in which a third person had been induced to believe through the act of the principal that the agent had authority, and therefore depend on the principle of apparent authority<sup>1</sup>. The belief may have been induced through the principal giving the agent express authority to do certain acts<sup>2</sup>, or through his having ratified the agent's acts<sup>3</sup>. In such cases, in the absence of actual notice, or of constructive notice by lapse of time or other indications<sup>4</sup>, the principal will remain liable to those dealing in good faith with the agent on the assumption that his authority still continues<sup>5</sup>.

An exception to this rule arises where the agency is determined by the death of the principal<sup>6</sup>, and also in the case of a termination of an implied agency<sup>7</sup>; and no notice of termination of an agency is required after a bankruptcy order against the principal has been made<sup>8</sup>.

1 *Trueman v Loder* (1840) 11 Ad & El 589; *Scarf v Jardine* (1882) 7 App Cas 345, HL; *Drew v Nunn* (1879) 4 QBD 661, CA; *Willis, Faber & Co Ltd v Joyce* (1911) 104 LT 576.

2 -- *v Harrison* (1699) 12 Mod Rep 346; *Curlewis v Birkbeck* (1863) 3 F & F 894; *Pole v Leask* (1863) 33 LJ Ch 155, HL.

3 *Ryan v Sams* (1848) 12 QB 460.

4 *Staveley v Uzielli* (1800) 2 F & F 30; *Aste v Montague* (1858) 1 F & F 264; *Marsden v City and County Assurance Co* (1865) LR 1 CP 232.

5 *Trueman v Loder* (1840) 11 Ad & El 589; and see the cases cited in note 1.

6 By his death the principal necessarily becomes unable to give notice of its termination (*Blades v Free* (1829) 9 B & C 167); but see the dictum of Brett LJ in *Drew v Nunn* (1879) 4 QBD 661 at 668, CA, that the estate of the deceased remains liable.

7 *Debenham v Mellon* (1880) 6 App Cas 24, HL.

8 See the Insolvency Act 1986 s 284; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 217. The reason why no notice of termination of agency is required is that any disposition of property after the commencement of bankruptcy is void. As to the limited protection of the agent see PARA 190.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/8. TERMINATION OF AGENCY/(5) NOTICE TO THIRD PERSONS/193. Protection where power of attorney revoked.

### 193. Protection where power of attorney revoked.

A donee of a power of attorney, who acts in pursuance of the power after it has been revoked, does not, by reason of the revocation, incur any liability either to the donor of the power or to any other person, if at the time of so acting he did not know of the revocation<sup>1</sup>. Where any person, without knowledge<sup>2</sup> of the revocation of the power, deals with the donee of the power after its revocation, the transaction between them is, in favour of that person, as valid as if the power had then been in existence<sup>3</sup>. Where the power is expressed to be irrevocable and to be given by way of security then, unless the person dealing with the donee knows that it was not in fact so given, he is entitled to assume that the power is incapable of revocation except by the donor acting with the consent of the donee, and he is to be treated for the purposes of the foregoing provision as having knowledge of the revocation only if he knows that the power has been revoked in that manner<sup>4</sup>. Where the interest of a purchaser<sup>5</sup> depends on whether a transaction between the donee of a power and another person was valid by virtue of that provision<sup>6</sup>, it must be conclusively presumed in favour of the purchaser that that other person did not at the material time know of the revocation of the power if either the transaction was completed within 12 months of the date on which the power came into operation, or that other person makes a statutory declaration, before or within three months after the completion of the purchase<sup>7</sup>, that he did not at the material time know of the revocation of the power<sup>8</sup>.

Without prejudice to the foregoing protection afforded to a purchaser, where the donee of a power of attorney executes, as transferor, an instrument transferring registered securities<sup>9</sup> and the instrument is executed for the purposes of a stock exchange transaction<sup>10</sup>, it must be conclusively presumed in favour of the transferee that the power had not been revoked at the date of the instrument if a statutory declaration is made to that effect by the donee on or within three months after that date<sup>11</sup>.

1 Powers of Attorney Act 1971 s 5(1). These provisions apply whenever the power of attorney was created but only to acts and transactions after 1 October 1971 (ie the date on which the Powers of Attorney Act 1971 was brought into force by virtue of s 11(4) (repealed)).

For these purposes knowledge of the revocation of a power includes knowledge of the occurrence of any event, such as the death of the donor, which has the effect of revoking the power: s 5(5). As to the events which operate to revoke powers see PARAS 186-190. In its application to a lasting power of attorney under the Mental Capacity Act 2005 (see s 9; and PARAS 217-218) which relates to matters in addition to the donor's property and affairs, the Powers of Attorney Act 1971 s 5 (see the text and notes 2-8) has effect as if references to 'revocation' included the cessation of the power in relation to the donor's property and affairs: Mental Capacity Act 2005 s 14(5). As to lasting and enduring powers of attorney generally see PARAS 194-238.

2 As to knowledge see note 1.

3 Powers of Attorney Act 1971 s 5(2).

4 Powers of Attorney Act 1971 s 5(3). As to powers expressed to be irrevocable and given by way of security see PARA 175.

5 As to the meanings of 'purchaser' and 'purchase' see the Law of Property Act 1925 s 205(1); and **SALE OF LAND** vol 42 (Reissue) PARA 55; definition applied by the Powers of Attorney Act 1971 s 5(6).

6 Ie the Powers of Attorney Act 1971 s 5(2); see the text and note 3.

7 See note 5.

8 Powers of Attorney Act 1971 s 5(4).

9 As to the meaning of 'registered securities' see the Stock Transfer Act 1963 s 4; and **COMPANIES** vol 14 (2009) PARA 400; definition applied by the Powers of Attorney Act 1971 s 6(2).

10 As to the meaning of 'stock exchange transaction' see the Stock Transfer Act 1963 s 4; and **COMPANIES** vol 14 (2009) PARA 400; definition applied by the Powers of Attorney Act 1971 s 6(2).

11 Powers of Attorney Act 1971 s 6(1).

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/9. LASTING AND ENDURING POWERS OF ATTORNEY/(1) INTRODUCTION/194. Enduring and lasting powers.

## **9. LASTING AND ENDURING POWERS OF ATTORNEY**

### **(1) INTRODUCTION**

#### **194. Enduring and lasting powers.**

Enduring powers of attorney and lasting powers of attorney are powers of attorney which are intended to survive the subsequent mental incapacity of the donor<sup>1</sup>. Enduring powers were introduced by the Enduring Powers of Attorney Act 1985<sup>2</sup> and could be created until 1 October 2007<sup>3</sup>, on which date that Act was repealed<sup>4</sup> and a new and expanded power called a lasting power of attorney was introduced<sup>5</sup>. Enduring powers created before 1 October 2007 continue to have effect under modified statutory provisions<sup>6</sup>, but no new enduring power can be created after that date<sup>7</sup>. All powers created after 1 October 2007 are lasting powers governed by separate statutory provisions<sup>8</sup>.

1 See the Enduring Powers of Attorney Act 1985 s 1 (repealed); the Mental Capacity Act 2005 s 9; and PARAS 195, 217.

2 The Enduring Powers of Attorney Act 1985 was brought into force on 10 March 1986 by the Enduring Powers of Attorney Act 1985 (Commencement) Order 1986, SI 1986/125.

3 Ie the date appointed by the Mental Capacity Act 2005 (Commencement No 2) Order 2007, SI 2007/1897, for the purposes of the repeal of the Enduring Powers of Attorney Act 1985 (see note 4) and the coming into force of the Mental Capacity Act 2005 ss 9-14, 22, 23, Schs 1, 4, Sch 5 Pt 2 (which make provision for lasting powers of attorney and for the continuing operation of enduring powers of attorney created before that date).

4 Ie by the Mental Capacity Act 2005 ss 66(1)(b), 67(2), Sch 7.

5 See the Mental Capacity Act 2005 ss 9-14, 22, 23, Sch 1; and PARA 217 et seq.

6 See the Mental Capacity Act 2005 Sch 4; and PARA 195 et seq. Schedule 4 is a modified version of the Enduring Powers of Attorney Act 1985, having effect in relation to enduring powers after 1 October 2007 in place of the corresponding provisions of the 1985 Act (repealed), which are noted in the introductory notes to PARAS 195-216. Any order or determination made, or other thing done, under the Enduring Powers of Attorney Act 1985 which has effect immediately before 1 October 2007 continues to have effect despite the repeal of that Act (Mental Capacity Act 2005 s 66(4), Sch 5 para 11(1)) and in so far as any such order, determination or thing could have been made or done under Sch 4 if it had then been in force it is to be treated as made or done thereunder and the powers of variation and discharge exercisable by the court apply accordingly (Sch 5 para 11(2)). This is without prejudice to the Interpretation Act 1978 s 16 (general savings on repeal: see **STATUTES** vol 44(1) (Reissue) PARA 1306 et seq). An application for the exercise of a power under the Enduring Powers of Attorney Act 1985 which is pending immediately before 1 October 2007 is to be treated, in so far as a corresponding power is exercisable under the Mental Capacity Act 2005 Sch 4, as an application for the exercise of that power: Sch 5 para 12(1). See further PARAS 200 note 4, 206 note 8, 211 note 3.

7 Mental Capacity Act 2005 s 66(2).

8 See the Mental Capacity Act 2005 ss 9-14, 22, 23, Sch 1; and PARA 217 et seq.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/9. LASTING AND ENDURING POWERS OF ATTORNEY/(2) ENDURING POWERS OF ATTORNEY/(i) Nature and Effect of Power/195. Effect of enduring power.

## **(2) ENDURING POWERS OF ATTORNEY**

### **(i) Nature and Effect of Power**

#### **195. Effect of enduring power.**

An enduring power of attorney<sup>1</sup> disapplies in respect of the donor of the power, upon his mental incapacity<sup>2</sup>, the statutory provisions governing mental capacity and the ability to make decisions<sup>3</sup>, and empowers the donee to act in accordance with the enduring power to make and implement decisions regarding the donor's property and affairs<sup>4</sup>.

An attorney under an enduring power expressed<sup>5</sup> to confer general authority on the attorney may, following registration of the instrument creating the power<sup>6</sup>, do on behalf of the donor anything which the donor could lawfully do by an attorney at the time when the donor executed the instrument<sup>7</sup>, provided that the thing done is not unreasonable having regard to all the circumstances and in particular the size of the donor's estate<sup>8</sup>. An attorney under an enduring power, whether general or limited, may following registration act under the power so as to benefit himself or other persons than the donor to the following extent (but no further):

- 47 (1) he may so act in relation to himself or in relation to any other person if the donor might be expected to provide for his or that person's needs respectively<sup>9</sup>; and
- 48 (2) he may do whatever the donor might be expected to do to meet those needs<sup>10</sup>,

and, without prejudice to the foregoing, may dispose of the property<sup>11</sup> of the donor by way of gift to the following extent but no further:

- 49 (a) he may make gifts of a seasonal nature or at a time, or on an anniversary, of a birth, a marriage or the formation of a civil partnership, to persons (including himself) who are related to or connected with the donor<sup>12</sup>; and
- 50 (b) he may make gifts to any charity to whom the donor made or might be expected to make gifts<sup>13</sup>,

provided that the value of each such gift is not unreasonable having regard to all the circumstances and in particular the size of the donor's estate<sup>14</sup>.

These powers are exercisable without the attorney obtaining any consent<sup>15</sup> but are subject to any conditions or restrictions contained in the instrument creating the power<sup>16</sup>. The exercise of trustee functions under an enduring power of attorney is subject to the Trustee Delegation Act 1999<sup>17</sup>. The grant of an enduring power of attorney does not confer a right on the attorney to conduct litigation in court, if he would not otherwise have had a right of audience<sup>18</sup>.

1    le an 'enduring power' for the purposes of the Mental Capacity Act 2005 s 66(3), Sch 4 (see the text and notes 2-4; and PARAS 196-216). As to the meaning of 'enduring power' see PARAS 196-198. Schedule 4 governs the continuing operation of enduring powers of attorney created under and formerly governed by the Enduring Powers of Attorney Act 1985 (repealed). The power to create enduring powers of attorney under the Enduring

Powers of Attorney Act 1985 ceased on 1 October 2007, but powers created before that date continue to have effect: see PARA 194.

The provisions of the Mental Capacity Act 2005 Sch 4 referred to in this paragraph (see the text and notes 2-4) make provision for the operation of enduring powers of attorney after 1 October 2007 corresponding to the provision made in respect of the operation of those powers before that date by the Enduring Powers of Attorney Act 1985 ss 1(1)(a), 3, 13(2) (repealed).

2 'Mentally incapable' or 'mental incapacity', except where it refers to revocation at common law, means in relation to any person, that he is incapable by reason of mental disorder of managing and administering his property and affairs; and 'mentally capable' and 'mental capacity' are construed accordingly: Mental Capacity Act 2005 Sch 4 para 23(1). 'Mental disorder', for the purposes of this definition, means mental disorder within the meaning of the Mental Health Act 1983 (as to which see s 1; and **MENTAL HEALTH** vol 30(2) (Reissue) PARA 402) disregarding the amendments made to that provision by the Mental Health Act 2007: see the Mental Capacity Act 2005 Sch 4 para 23(1), (1A) (Sch 4 para 23(1) prospectively amended, Sch 4 para 23(1A) prospectively added, by the Mental Health Act 2007 ss 1(4), 55, Sch 1 para 23, Sch 11 Pt 1). At the date at which this volume states the law no day had been appointed for the coming into force of the prospective amendments referred to above, but their commencement has no material effect on the meanings of the terms referred to in this paragraph.

3 Ie the Mental Capacity Act 2005 s 1 (see **MENTAL HEALTH** vol 30(2) (Reissue) PARA 641): those provisions accordingly do not apply in respect of an individual who has created an enduring power of attorney (see Sch 4 para 1(1)).

4 See PARA 196 et seq. An enduring power of attorney is accordingly not revoked by any subsequent mental incapacity of the donor: Mental Capacity Act 2005 Sch 4 para 1(1)(a).

5 Ie expressed by means of the instrument creating the power: Mental Capacity Act 2005 Sch 4 para 3(1). As to the creation of enduring powers see PARAS 196-198.

6 As to the requirement for, and effect of, registration see PARAS 199-210.

7 Mental Capacity Act 2005 Sch 4 para 3(1).

8 Mental Capacity Act 2005 Sch 4 para 3(1)(a), (3).

9 Mental Capacity Act 2005 Sch 4 para 3(2)(a). Any question arising under or for the purposes of Sch 4 as to what the donor of an enduring power might at any time be expected to do is determined by assuming that he had full mental capacity at the time but otherwise by reference to the circumstances existing at that time: Sch 4 para 23(2). The education of a child was a 'need' within the meaning of the Enduring Powers of Attorney Act 1985 s 3(4) (ie the provision (repealed) to which the Mental Capacity Act 2005 Sch 4 para 3(2)(a) corresponds): *Re Cameron (deceased)*; *Phillips v Cameron* [1999] Ch 386, [1999] 2 All ER 924.

10 Mental Capacity Act 2005 Sch 4 para 3(2)(b).

11 'Property' includes any thing in action and any interest in real or personal property: Mental Capacity Act 2005 s 64(1).

12 Mental Capacity Act 2005 Sch 4 para 3(3)(a).

13 Mental Capacity Act 2005 Sch 4 para 3(3)(b).

14 Mental Capacity Act 2005 Sch 4 para 3(3).

15 Mental Capacity Act 2005 Sch 4 para 3(2), (3).

16 Mental Capacity Act 2005 Sch 4 para 3(1)(b), (2), (3).

17 See the Trustee Delegation Act 1999 s 1; and **TRUSTS** vol 48 (2007 Reissue) PARA 985.

18 *Gregory v Turner*; *R (on the application of Morris) v North Somerset Council* [2003] EWCA Civ 183, [2003] All ER (D) 267 (Feb).

## UPDATE

### 195 Effect of enduring power



NOTE 2--Day appointed for commencement of amendments made by Mental Health Act 2007 is 3 November 2008: SI 2008/1210, SI 2008/1900.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/9. LASTING AND ENDURING POWERS OF ATTORNEY/(2) ENDURING POWERS OF ATTORNEY/(i) Nature and Effect of Power/196. Characteristics of an enduring power.

### 196. Characteristics of an enduring power.

A power of attorney cannot be an enduring power<sup>1</sup> unless, when he executed the instrument creating it<sup>2</sup>, the attorney was:

- 51 (1) an individual who has attained 18 years and is not bankrupt<sup>3</sup>; or
- 52 (2) a trust corporation<sup>4</sup>.

A power of attorney also cannot be an enduring power if it gives the attorney a right to appoint a substitute or successor<sup>5</sup>, and an instrument which appoints more than one person to be an attorney cannot create an enduring power unless the attorneys are appointed to act jointly or jointly and severally<sup>6</sup>.

Certain older powers of attorney delegating trustee powers<sup>7</sup> also could not be enduring powers<sup>8</sup>.

1    Ie for the purposes of the Mental Capacity Act 2005 Sch 4: see PARA 195 note 1. The provisions of Sch 4 referred to in this paragraph (see the text and notes 2-6) make provision for the operation of enduring powers of attorney after 1 October 2007 corresponding to the provision made in respect of the operation of those powers before that date by the Enduring Powers of Attorney Act 1985 ss 2(7), (9), 11(1)-(4), (8), Sch 3 paras 1, 2 (repealed).

2    For the purposes of joint attorneys the reference to the time when the attorney executed the instrument is read as a reference to the time when the second or last attorney executed the instrument: Mental Capacity Act 2005 Sch 4 para 21(1).

3    Mental Capacity Act 2005 Sch 4 paras 2(5)(a), 23(1). References in the Mental Capacity Act 2005 to the 'bankruptcy' of an individual include a case where a bankruptcy restrictions order (or, as the case may be, an interim bankruptcy restrictions order) under the Insolvency Act 1986 (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY**) has effect in respect of him: Mental Capacity Act 2005 s 66(3), (4). As to bankruptcy restrictions orders and interim bankruptcy restrictions orders see the Insolvency Act 1986 Sch 4A; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY**.

4    Mental Capacity Act 2005 Sch 4 para 2(5)(b). As to the meaning of 'trust corporation' see the Trustee Act 1925 s 68(1) para (18); and **TRUSTS** vol 48 (2007 Reissue) PARA 798; definition applied by the Mental Capacity Act 2005 s 66(1).

5    Mental Capacity Act 2005 Sch 4 para 2(6). In the case of joint attorneys the reference to the attorney is to be read as a reference to any attorney under the power: Sch 4 para 21(2).

6    Mental Capacity Act 2005 Sch 4 para 20(1)-(3). In the case of joint and several attorneys a failure, as respects any one attorney, to comply with the requirements for the creation of enduring powers (ie Sch 4 para 2(1)-(7), (10) (as to which see also PARAS 197-198) and the regulations cited in PARA 197) prevents the instrument from creating such a power in his case without affecting either its efficacy for that purpose as respects the other or others or its efficacy in his case for the purpose of creating a power of attorney which is not an enduring power: Sch 4 para 20(4), (8).

7    Ie a power of attorney created before 1 March 2000 (see note 8) under which a trustee may delegate the execution of trusts pursuant to the Trustee Act 1925 s 25 as that provision had effect before its substitution by the Trustee Delegation Act 1999 s 5(1), (2).

8 See the Enduring Powers of Attorney Act 1985 s 2(8) (repealed). Section 2(8) does not apply to powers of attorney created pursuant to the Trustee Act 1925 s 25 as substituted (see note 7; and **TRUSTS** vol 48 (2007 Reissue) PARA 984) after 1 March 2000 (ie the date on which the substitution of the Trustee Act 1925 s 25 was brought into force by the Trustee Delegation Act 1999 (Commencement) Order 2000, SI 2000/216): Trustee Delegation Act 1999 s 6.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/9. LASTING AND ENDURING POWERS OF ATTORNEY/(2) ENDURING POWERS OF ATTORNEY/(ii) Creation, Revocation and Disclaimer of Power/197. Procedural requirements for creation of enduring power.

## **(ii) Creation, Revocation and Disclaimer of Power**

### **197. Procedural requirements for creation of enduring power.**

A power of attorney is an enduring power<sup>1</sup> if the instrument which creates the power:

- 53 (1) is in the prescribed form<sup>2</sup>;
- 54 (2) was executed in the prescribed manner by the donor and the attorney<sup>3</sup>; and
- 55 (3) incorporated at the time of execution by the donor the prescribed explanatory information<sup>4</sup>.

An instrument in the prescribed form purporting to have been executed in the prescribed manner is to be taken, in the absence of evidence to the contrary, to be a document which incorporated at the time of execution by the donor the prescribed explanatory information<sup>5</sup>, and an instrument that differs in an immaterial respect in form or mode of expression from the prescribed form is treated as sufficient in point of form and expression<sup>6</sup>.

1 Ie for the purposes of the Mental Capacity Act 2005 Sch 4: see PARA 195 note 1. The provisions of Sch 4 referred to in this paragraph (see the text and notes 2-6) make provision for the operation of enduring powers of attorney after 1 October 2007 corresponding to the provision made in respect of the operation of those powers before that date by the Enduring Powers of Attorney Act 1985 ss 2(1), (5), (6), (13), 11(1), (4), (8) (repealed).

2 Mental Capacity Act 2005 Sch 4 para 2(1)(a). The prescribed form is the form prescribed at the time the instrument was executed (Sch 4 para 2(2)): for the prescribed form for an instrument executed between 10 March 1986 and 30 October 1987 see the Enduring Powers of Attorney (Prescribed Form) Regulations 1986, SI 1986/126, reg 3, Schedule (revoked); for the prescribed form for an instrument executed between 1 November 1987 and 30 July 1990 see the Enduring Powers of Attorney (Prescribed Form) Regulations 1987, SI 1987/1612, reg 2, Schedule (revoked); and for the prescribed form for an instrument executed between 31 July 1990 and 30 September 2007 see the Enduring Powers of Attorney (Prescribed Form) Regulations 1990, SI 1990/1376, reg 2, Schedule (substituted by SI 2005/3116 with savings (see below)). Note also that by virtue of the Enduring Powers of Attorney (Prescribed Form) Regulations 1987, SI 1987/1612, reg 4 (revoked), a power executed in the form prescribed by the Enduring Powers of Attorney (Prescribed Form) Regulations 1986, SI 1986/126, and executed before 1 July 1988, was capable of being a valid enduring power of attorney; that by virtue of the Enduring Powers of Attorney (Prescribed Form) Regulations 1990, SI 1990/1376, reg 5(a), a power executed in the form prescribed by the Enduring Powers of Attorney (Prescribed Form) Regulations 1987, SI 1987/1612, and executed by the donor before 31 July 1991 was capable (whether or not seals were affixed to it) of being a valid enduring power of attorney; and that by virtue of the Enduring Powers of Attorney (Prescribed Form) (Amendment) Regulations 2005, SI 2005/3116, reg 3 (amended by SI 2007/548), a power executed in the form prescribed in the Enduring Powers of Attorney (Prescribed Form) Regulations 1990, SI 1990/1376, as though it had not been substituted as noted above and executed by the donor before 1 October 2007 was capable (whether or not seals were affixed to it) of being a valid enduring power of attorney. Provision was also made for the use of a Welsh language form instead of the form prescribed by the Enduring Powers of Attorney (Prescribed Form) Regulations 1990, SI 1990/1376: see the Enduring Powers of Attorney (Welsh Language Prescribed Form) Regulations 2005, SI 2005/3125, reg 2, Sch 1 (replacing the form provided for in the Enduring Powers of Attorney (Welsh Language Prescribed Form) Regulations 2000, SI 2000/289, reg 2, Schedule, subject to the proviso that a power executed in that form and executed by the donor before 1 October 2007 was

capable (whether or not seals were affixed to it) of being a valid enduring power of attorney (Powers of Attorney (Welsh Language Prescribed Form) Regulations 2005, SI 2005/3125, reg 3 (amended by SI 2007/549))).

These regulations were made under and in accordance with the Enduring Powers of Attorney Act 1985 s 2(2)-(4) (repealed).

3 Mental Capacity Act 2005 Sch 4 para 2(1)(b). The prescribed manner is the manner prescribed at the time the instrument was executed (Sch 4 para 2(2)): for the prescribed manner of execution for an instrument executed between 10 March 1986 and 30 October 1987 see the Enduring Powers of Attorney (Prescribed Form) Regulations 1986, SI 1986/126, reg 4 (revoked); for the prescribed manner of execution for an instrument executed between 1 November 1987 and 30 July 1990 see the Enduring Powers of Attorney (Prescribed Form) Regulations 1987, SI 1987/1612, reg 3 (revoked); and for the prescribed manner of execution for an instrument executed between 31 July 1990 and 30 September 2007 see the Enduring Powers of Attorney (Prescribed Form) Regulations 1990, SI 1990/1376, regs 3, 4. See also, as to the form of execution, note 2.

These regulations were made under and in accordance with the Enduring Powers of Attorney Act 1985 s 2(2)-(4) (repealed).

In the case of joint and several attorneys (see PARA 196) a failure, as respects any one attorney, to comply with the requirements for the creation of enduring powers (ie the Mental Capacity Act 2005 Sch 4 para 2(1)-(7), (10) (as to which see also PARAS 196, 198) and the regulations cited herein) prevents the instrument from creating such a power in his case without affecting either its efficacy for that purpose as respects the other or others or its efficacy in his case for the purpose of creating a power of attorney which is not an enduring power: Sch 4 para 20(4), (8).

4 Mental Capacity Act 2005 Sch 4 para 2(1)(c). The prescribed explanatory information is the explanatory information prescribed at the time the instrument was executed (Sch 4 para 2(2)): for the prescribed explanatory information for an instrument executed between 10 March 1986 and 30 October 1987 see the Enduring Powers of Attorney (Prescribed Form) Regulations 1986, SI 1986/126, reg 5, Schedule (revoked); for the prescribed explanatory information for an instrument executed between 1 November 1987 and 30 July 1990 see the Enduring Powers of Attorney (Prescribed Form) Regulations 1987, SI 1987/1612, reg 2, Schedule (revoked); and for the prescribed explanatory information for an instrument executed between 31 July 1990 and 30 September 2007 see the Enduring Powers of Attorney (Prescribed Form) Regulations 1990, SI 1990/1376, reg 2, Schedule (substituted by SI 2005/3116 with savings (see note 2)).

These regulations were made under and in accordance with the Enduring Powers of Attorney Act 1985 s 2(2)-(4) (repealed).

5 Mental Capacity Act 2005 Sch 4 para 2(3).

6 Mental Capacity Act 2005 Sch 4 para 2(4). See, however, *Practice Direction* [1989] 2 All ER 64, [1989] 1 WLR 311, which states that marginal notes in the prescribed form may be omitted only if they are irrelevant, correspond to the omitted or deleted one of a pair of alternatives, or constitute an immaterial difference from the prescribed form; and the Enduring Powers of Attorney (Prescribed Form) Regulations 1990, SI 1990/1376, reg 2(1), (2).

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/9. LASTING AND ENDURING POWERS OF ATTORNEY/(2) ENDURING POWERS OF ATTORNEY/(ii) Creation, Revocation and Disclaimer of Power/198. Revocation, suspension and disclaimer of enduring powers.

## **198. Revocation, suspension and disclaimer of enduring powers.**

An enduring power of attorney<sup>1</sup> is revoked by the bankruptcy<sup>2</sup> of the donor or the attorney<sup>3</sup> (although if the donor or attorney is bankrupt merely because an interim bankruptcy restrictions order<sup>4</sup> has effect in respect of him, the power is only suspended for so long as the order has effect<sup>5</sup>). An enduring power is also revoked if a court<sup>6</sup> so directs on exercising a power<sup>7</sup> to make decisions or appoint a deputy to make such decisions in relation to the donor<sup>8</sup>.

No disclaimer of an enduring power, whether by deed or otherwise, is valid unless and until the attorney gives notice<sup>9</sup> of it to the donor or, in certain circumstances<sup>10</sup>, to the court<sup>11</sup>.

1     Ie an enduring power of attorney for the purposes of the Mental Capacity Act 2005 Sch 4: see PARA 195 note 1. The provisions of Sch 4 referred to in this paragraph (see the text and notes 2-11) make provision for the operation of enduring powers of attorney after 1 October 2007 corresponding to the provision made in respect of the operation of those powers before that date by the Enduring Powers of Attorney Act 1985 ss 2(10)-(12), 8(4)(b), Sch 3 paras 2, 7 (repealed).

2     As to the meaning of 'bankruptcy' see PARA 196 note 3.

3     Mental Capacity Act 2005 Sch 4 para 2(7). In the case of joint attorneys (see PARA 196) the reference in Sch 4 para 2(7) to the attorney is to be read as a reference to any attorney under the power (Sch 4 para 21(2)), and in the case of joint and several attorneys (see PARA 196), the reference to the bankruptcy of the attorney is to be read as a reference to the bankruptcy of the last remaining attorney under the power (with the bankruptcy of any other attorney under the power causing that person to cease to be an attorney under the power) (Sch 4 para 22(1)). The Public Guardian must cancel the registration of an instrument creating an enduring power if satisfied that the power has been revoked by the bankruptcy of the donor or attorney (or, if the attorney is a body corporate, by its winding up or dissolution): see Sch 4 para 17(b); and PARA 210. As to the Public Guardian see ss 57-60; and **MENTAL HEALTH** vol 30(2) (Reissue) PARAS 761-763.

4     As to bankruptcy restrictions orders and interim bankruptcy restrictions orders see the Insolvency Act 1986 Sch 4A; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY**.

5     Mental Capacity Act 2005 Sch 4 para 2(8). In the case of joint attorneys the reference in Sch 4 para 2(8) to the attorney is to be read as a reference to any attorney under the power (Sch 4 para 21(2)), and in the case of joint and several attorneys the reference to the suspension of the power is to be read as a reference to its suspension in so far as it relates to the attorney in respect of whom the interim bankruptcy restrictions order has effect (Sch 4 para 22(2)).

6     Ie the Court of Protection established by the Mental Capacity Act 2005 s 45: see s 64(1); and as to the Court of Protection see **MENTAL HEALTH** vol 30(2) (Reissue) PARAS 750-761. For specific procedural provision in connection with the matters herein referred to see the Court of Protection Rules 2007, SI 2007/1744, r 68.

7     Ie under the Mental Capacity Act 2005 ss 16-20 (see **MENTAL HEALTH** vol 30(2) (Reissue) PARAS 757-760).

8     Mental Capacity Act 2005 Sch 4 para 2(9). Prior to 1 October 2007 (see note 1) an enduring power would be revoked if the court so directed on the exercise of any of its powers relating to the management of a person's property and affairs under the Mental Health Act 1983 Pt VII (ss 93-113) (repealed) (see **MENTAL HEALTH** vol 30(2) (Reissue) PARA 674 et seq): see the Enduring Powers of Attorney Act 1985 s 2(11) (repealed).

The court must direct the Public Guardian to cancel the registration of an instrument creating an enduring power on giving a direction under this provision that the power is to be revoked: see the Mental Capacity Act 2005 Sch 4 para 16(4)(b); and 213.

9     Ie notice in writing: Mental Capacity Act 2005 Sch 4 para 23(1).

10    Ie where the Mental Capacity Act 2005 Sch 4 para 4(6) (notification of disclaimer on actual or impending incapacity of donor: see PARA 200) or Sch 4 para 15(1) (disclaimer after registration: see PARA 209) applies.

11    Mental Capacity Act 2005 Sch 4 para 2(10). The Public Guardian must cancel the registration of an instrument creating an enduring power on receipt of a disclaimer signed by the attorney: see Sch 4 para 17(a); and PARA 210.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/9. LASTING AND ENDURING POWERS OF ATTORNEY/(2) ENDURING POWERS OF ATTORNEY/(iii) Activation and Operation of Power/199. Requirement for registration.

### (iii) Activation and Operation of Power

#### 199. Requirement for registration.

The donee of an enduring power<sup>1</sup> may not, upon the donor's mental incapacity<sup>2</sup> supervening, do anything under the authority of the power unless or until the instrument creating the power is registered<sup>3</sup>. This prohibition on activating the power before registration is not, however,

absolute: the attorney may take action under the power to maintain the donor or prevent loss to his estate<sup>4</sup> or to maintain himself or other persons to the extent that the donor might be expected to provide for his or the other person's needs<sup>5</sup>, provided he has made an application for registration of the instrument<sup>6</sup>. Provision is also made for protecting the attorney from liability during the period when his authority to act is suspended pending registration<sup>7</sup>.

1     le an enduring power of attorney for the purposes of the Mental Capacity Act 2005 Sch 4: see PARA 195 note 1. The provisions of Sch 4 referred to in this paragraph (see the text and notes 2-7) make provision for the operation of enduring powers of attorney after 1 October 2007 corresponding to the provision made in respect of the operation of those powers before that date by the Enduring Powers of Attorney Act 1985 ss 1(1)(b), (c), (2), (3), 3(4), 11(5)(a) (repealed).

2     As to the meaning of 'mentally incapable' and cognate expressions see PARA 195 note 2.

3     Mental Capacity Act 2005 Sch 4 para 1(1)(b). Registration is under Sch 4 para 13 (see PARA 206).

4     Mental Capacity Act 2005 Sch 4 para 1(2)(a).

5     Mental Capacity Act 2005 Sch 4 paras 1(2)(b), 3(2)(a). In these circumstances the attorney may do whatever the donor might be expected to do to meet the needs referred to: Sch 4 para 3(2)(b). The education of a child was a 'need' within the meaning of the Enduring Powers of Attorney Act 1985 s 3(4) (ie the provision (repealed) to which the Mental Capacity Act 2005 Sch 4 para 3(2)(a) corresponds): *Re Cameron (deceased)*; *Phillips v Cameron* [1999] Ch 386, [1999] 2 All ER 924.

6     Mental Capacity Act 2005 Sch 4 para 1(2). Where the attorney purports to act as provided by Sch 4 para 1(2) then, in favour of a person who deals with him without knowledge that the attorney is acting otherwise than in accordance with Sch 4 para 1(2)(a) or (b), the transaction between them is as valid as if the attorney were acting in accordance with Sch 4 para 1(2)(a) or (b): Sch 4 para 1(3).

In the case of joint and joint and several attorneys (see PARA 196), where one or more but not both or all of the attorneys make or join in making an application for registration of the instrument then an attorney who is not an applicant as well as one who is may act pending the initial determination of the application: Sch 4 para 20(5) (a). As to applications prior to registration see also *Practice Direction* [1986] 2 All ER 42.

7     See the Mental Capacity Act 2005 Sch 4 para 1(1)(c), which provides that if and so long as Sch 4 para 1(1) (b) (see the text and notes 1-3) operates to suspend the donee's authority to act under the enduring power, the Powers of Attorney Act 1971 s 5 (protection of donee and third persons: see PARA 193), so far as applicable, applies as if the power had been revoked by the donor's mental incapacity.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/9. LASTING AND ENDURING POWERS OF ATTORNEY/(2) ENDURING POWERS OF ATTORNEY/(iii) Activation and Operation of Power/200. Matters preceding registration.

## 200. Matters preceding registration.

If the attorney under an enduring power<sup>1</sup> has reason to believe that the donor is or is becoming mentally incapable<sup>2</sup> he must as soon as practicable make an application to the Public Guardian<sup>3</sup> for registration of the instrument creating the power<sup>4</sup>. Before making such application, the attorney must comply with the provisions as to notice<sup>5</sup> and may refer to the court<sup>6</sup> for its determination any question as to the validity of the power<sup>7</sup> and must comply with any direction given to him by the court on that determination<sup>8</sup>. No disclaimer of the power is valid unless and until the attorney gives notice<sup>9</sup> of it to the Public Guardian<sup>10</sup>.

1     le an enduring power of attorney for the purposes of the Mental Capacity Act 2005 Sch 4: see PARA 195 note 1. The provisions of Sch 4 referred to in this paragraph (see the text and notes 2-10) make provision for the operation of enduring powers of attorney after 1 October 2007 corresponding to the provision made in respect of the operation of those powers before that date by the Enduring Powers of Attorney Act 1985 s 4(1)-(3), (5), (6), Sch 3 para 8 (repealed).

2 As to the meaning of 'mentally incapable' and cognate expressions see PARA 195 note 2.

3 As to the Public Guardian see the Mental Capacity Act 2005 ss 57-60; and **MENTAL HEALTH** vol 30(2) (Reissue) PARAS 761-763.

4 Mental Capacity Act 2005 Sch 4 para 4(1), (2). As to registration see further PARA 206. An application for the exercise of a power under the Enduring Powers of Attorney Act 1985 (repealed) which is pending immediately before 1 October 2007 (see note 1; and PARA 194) is to be treated, in so far as a corresponding power is exercisable under the Mental Capacity Act 2005 Sch 4, as an application for the exercise of that power, and accordingly a pending application under the Enduring Powers of Attorney Act 1985 s 4(2) (repealed) for the registration of an instrument is to be treated as an application to the Public Guardian under the Mental Capacity Act 2005 Sch 4 para 4, and any notice given in connection with that application under the Enduring Powers of Attorney Act 1985 Sch 1 (repealed) is to be treated as given under the Mental Capacity Act 2005 Sch 4 paras 5-12 (as the case may be): Sch 5 para 12(1), (2)(a).

5 Mental Capacity Act 2005 Sch 4 para 4(3). As to the notification requirements see PARA 201. Provision is made for the registration of an instrument in certain circumstances notwithstanding the failure to give notice: see Sch 4 para 13(3); and PARA 207.

6 Re the Court of Protection: see PARA 198 note 6. For specific procedural provision in connection with the matters herein referred to see the Court of Protection Rules 2007, SI 2007/1744, r 68.

7 Mental Capacity Act 2005 Sch 4 para 4(5)(a).

8 Mental Capacity Act 2005 Sch 4 para 4(5)(b).

9 As to the giving of notices see PARA 198 note 9. As to the duty to give notice of disclaimer to the donor see the Mental Capacity Act 2005 Sch 4 para 2(10); and PARA 198.

10 Mental Capacity Act 2005 Sch 4 para 4(6). For the purpose of joint and several attorneys (see PARA 196), the restriction on disclaimer imposed by Sch 4 para 4(6) applies only to those attorneys who have reason to believe that the donor is or is becoming mentally incapable: Sch 4 para 22(3).

The Public Guardian must notify the donor if he receives a notice under Sch 4 para 4(6) (Sch 4 para 4(6)), and must cancel the registration of an instrument creating an enduring power on receipt of a disclaimer signed by the attorney (see Sch 4 para 17(a); and PARA 210).

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/9. LASTING AND ENDURING POWERS OF ATTORNEY/(2) ENDURING POWERS OF ATTORNEY/(iii) Activation and Operation of Power/201. Who should be notified of intended registration.

## **201. Who should be notified of intended registration.**

Before making an application to register<sup>1</sup> an instrument creating an enduring power<sup>2</sup> the attorney must give notice<sup>3</sup> of his intention to do so to the donor<sup>4</sup> and no more than three<sup>5</sup> (in this order of preference<sup>6</sup>) of:

- 56 (1) the donor's spouse or civil partner<sup>7</sup>;
- 57 (2) the donor's children<sup>8</sup>;
- 58 (3) the donor's parents<sup>9</sup>;
- 59 (4) the donor's brothers and sisters, whether of the whole or half blood<sup>10</sup>;
- 60 (5) the widow, widower or surviving civil partner of a child of the donor<sup>11</sup>;
- 61 (6) the donor's grandchildren<sup>12</sup>;
- 62 (7) the children of the donor's brothers and sisters of the whole blood<sup>13</sup>;
- 63 (8) the children of the donor's brothers and sisters of the half blood<sup>14</sup>;
- 64 (9) the donor's uncles and aunts of the whole blood<sup>15</sup>; and
- 65 (10) the children of the donor's uncles and aunts of the whole blood<sup>16</sup>.

An attorney is not required to give notice to himself or any other attorney under the power who is joining in making the application (even though he or the other attorney is entitled to receive notice by virtue of being a prescribed relative)<sup>17</sup>, unless the application for registration is being made under a joint and several power<sup>18</sup>, in which case the attorney must give notice of his intention to apply to any other attorney under the power who is not joining in making the application<sup>19</sup>.

Before applying for registration the attorney may make an application to the court<sup>20</sup> to be dispensed from the requirement to give notice to any of these persons (including the donor and any other attorney), and the court must grant the application if it is satisfied that it would be undesirable or impracticable for the attorney to give the relevant person notice<sup>21</sup> or that no useful purpose is likely to be served by giving him notice<sup>22</sup>. Moreover, a person (other than the donor) is not entitled to receive notice under these provisions if his name or address is not known to the applying attorney and cannot be reasonably ascertained by him<sup>23</sup> or the applying attorney has reason to believe that he has not reached 18 or is mentally incapable<sup>24</sup>.

1 For the duty to register an enduring power see PARA 200. As to registration see further PARA 206.

2 I.e. an enduring power of attorney for the purposes of the Mental Capacity Act 2005 Sch 4: see PARA 195 note 1. The provisions of Sch 4 referred to in this paragraph (see the text and notes 3-24) make provision for the operation of enduring powers of attorney after 1 October 2007 corresponding to the provision made in respect of the operation of those powers before that date by the Enduring Powers of Attorney Act 1985 Sch 1 paras 1-4, 7, 8(2) (repealed).

3 As to the giving of notices see PARA 198 note 9. For these purposes a notice given by post is regarded as given on the date on which it was posted, notwithstanding anything in the Interpretation Act 1978 s 7 (construction of references to service by post: see **STATUTES** vol 44(1) (Reissue) PARA 1388); Mental Capacity Act 2005 Sch 4 para 12. Any pending notice given in connection with an application under the Enduring Powers of Attorney Act 1985 Sch 1 (repealed) is to be treated as given under these provisions: see the Mental Capacity Act 2005 Sch 5 para 12(1), (2)(a); and PARA 200 note 4.

4 Mental Capacity Act 2005 Sch 4 para 8(1).

5 Mental Capacity Act 2005 Sch 4 para 6(3)(a). Notwithstanding the specified limit of three persons, if there is more than one person falling within any of classes listed in heads (1)-(9) in the text, and at least one of those persons would be entitled to receive notice under these provisions, then (subject to Sch 4 para 6(2) (see the text and notes 23-24)), all the persons falling within that class are entitled to receive notice: Sch 4 para 6(4).

6 Mental Capacity Act 2005 Sch 4 para 6(3)(b).

7 Mental Capacity Act 2005 Sch 4 paras 5, 6(1)(a).

8 Mental Capacity Act 2005 Sch 4 para 6(1)(b).

9 Mental Capacity Act 2005 Sch 4 para 6(1)(c).

10 Mental Capacity Act 2005 Sch 4 para 6(1)(d).

11 Mental Capacity Act 2005 Sch 4 para 6(1)(e).

12 Mental Capacity Act 2005 Sch 4 para 6(1)(f).

13 Mental Capacity Act 2005 Sch 4 para 6(1)(g).

14 Mental Capacity Act 2005 Sch 4 para 6(1)(h).

15 Mental Capacity Act 2005 Sch 4 para 6(1)(i).

16 Mental Capacity Act 2005 Sch 4 para 6(1)(j).

17 Mental Capacity Act 2005 Sch 4 para 7(1). The 'prescribed relatives' are those persons entitled to be given notice under Sch 4 paras 5, 6 (see the text and notes 1-16).

18 As to joint and several powers of attorney see PARA 196.

19 Mental Capacity Act 2005 Sch 4 para 11(1). In the case of joint and joint and several attorneys, where one or more but not both or all of the attorneys makes or joins in making an application for registration of the instrument then notice of the application must also be given to the other attorney or attorneys: Sch 4 para 20(5)(b).

20 Ie the Court of Protection: see PARA 198 note 6. For specific procedural provision in connection with the matters herein referred to see the Court of Protection Rules 2007, SI 2007/1744, r 68.

21 Mental Capacity Act 2005 Sch 4 paras 7(2)(a), 8(2), 11(1).

22 Mental Capacity Act 2005 Sch 4 para 7(2)(b).

23 Mental Capacity Act 2005 Sch 4 paras 6(2)(a), 11(2)(a).

24 Mental Capacity Act 2005 Sch 4 paras 6(2)(b), 11(2)(b). As to the meaning of 'mentally incapable' and cognate expressions see PARA 195 note 2.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/9. LASTING AND ENDURING POWERS OF ATTORNEY/(2) ENDURING POWERS OF ATTORNEY/(iii) Activation and Operation of Power/202. Form and content of notices of intended registration.

## **202. Form and content of notices of intended registration.**

A notice to relatives<sup>1</sup> or to the donor of the intended registration of an enduring power of attorney<sup>2</sup> must be in the prescribed form<sup>3</sup> and state that the attorney proposes to make an application to the Public Guardian<sup>4</sup> for the registration of the instrument creating the enduring power in question<sup>5</sup>. In addition, a notice to relatives must inform the person to whom it is given of the right to object<sup>6</sup> to the proposed registration<sup>7</sup> and specify the grounds on which an objection to registration may be made<sup>8</sup>, and a notice to the donor must also provide (or arrange for the provision of) an explanation to the donor of the notice and its effect and why it is being brought to his attention<sup>9</sup> and inform him that, while the instrument creating the enduring power remains registered, any revocation of the power by him will be ineffective unless and until the revocation is confirmed by the court<sup>10</sup>.

1 Ie the persons listed in PARA 201 text and notes 7-16. As to the giving of notices see PARA 198 note 9.

2 Ie an enduring power of attorney for the purposes of the Mental Capacity Act 2005 Sch 4: see PARA 195 note 1. For the duty to register an enduring power see PARA 200. As to registration see further PARAS 201, 206. The provisions of Sch 4 referred to in this paragraph (see the text and notes 2-10) make provision for the operation of enduring powers of attorney after 1 October 2007 corresponding to the provision made in respect of the operation of those powers before that date by the Enduring Powers of Attorney Act 1985 Sch 1 paras 5, 6 (repealed).

3 Mental Capacity Act 2005 Sch 4 paras 9(a), 10(a). 'Prescribed' means prescribed by regulations under the Mental Capacity Act 2005: s 64(1). For the prescribed form see the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 23(1), Sch 7. Provision is also made for the use of Welsh language forms (reg 3(1)(a)); forms which differ in an immaterial respect in form or mode of expression from the specified form, forms to the same effect but with such variations as the circumstances may require or the court or Public Guardian may approve, and Welsh versions of such forms, are also acceptable (reg 3(1)(b)).

4 As to the Public Guardian see the Mental Capacity Act 2005 ss 57-60; and **MENTAL HEALTH** vol 30(2) (Reissue) PARAS 761-763.

5 Mental Capacity Act 2005 Sch 4 paras 9(b), 10(b). Any pending notice given in connection with an application under the Enduring Powers of Attorney Act 1985 Sch 1 (repealed) is to be treated as given under these provisions: see the Mental Capacity Act 2005 Sch 5 para 12(1), (2)(a); and PARA 200 note 4.

6 Ie under the Mental Capacity Act 2005 Sch 4 para 13(4) (see PARA 206).



7 Mental Capacity Act 2005 Sch 4 para 9(c).

8 Mental Capacity Act 2005 Sch 4 para 9(d). These are the grounds set out in Sch 4 para 13(9) (see PARA 204).

9 Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 23(2). This information must be provided to the donor personally and in a way that is appropriate to the donor's circumstances (for example using simple language, visual aids or other appropriate means): reg 23(3).

10 Mental Capacity Act 2005 Sch 4 para 10(c). 'The court' is the Court of Protection: see PARA 198 note 6. For specific procedural provision in connection with the matters herein referred to see the Court of Protection Rules 2007, SI 2007/1744, r 68.

## UPDATE

### 202 Form and content of notices of intended registration

NOTE 3--SI 2007/1253 Sch 7 substituted: SI 2010/1063.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/9. LASTING AND ENDURING POWERS OF ATTORNEY/(2) ENDURING POWERS OF ATTORNEY/(iii) Activation and Operation of Power/203. Form and content of applications for registration.

### 203. Form and content of applications for registration.

An application for the registration of an enduring power<sup>1</sup> must be made in the prescribed form<sup>2</sup>. Any person who, in an application for registration, makes a statement which he knows to be false in a material particular is guilty of an offence<sup>3</sup>.

1 I.e. an enduring power of attorney for the purposes of the Mental Capacity Act 2005 Sch 4: see PARA 195 note 1. Applications are made to the Public Guardian: see PARA 202. The provisions of Sch 4 referred to in this paragraph (see the text and notes 2-3) make provision for the operation of enduring powers of attorney after 1 October 2007 corresponding to the provision made in respect of the operation of those powers before that date by the Enduring Powers of Attorney Act 1985 s 4(4), (7), (8) (repealed).

2 Mental Capacity Act 2005 Sch 4 para 4(4)(a). For the prescribed form see the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 24(1), Sch 8. The Mental Capacity Act 2005 Sch 4 para 4(4)(b) also requires that an application for the registration of an enduring power must contain such statements as may be prescribed: however at the date at which this volume states the law no such statements had been prescribed. Provision is also made for the administration of applications where the instrument to be registered is neither the original instrument creating the power nor a certified copy thereof: see the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 24(2), (3); and PARA 206. A fee is payable: see the Public Guardian (Fees, etc) Regulations 2007, SI 2007/2051, reg 4, Schedule.

3 Mental Capacity Act 2005 Sch 4 para 4(7). A person who is found guilty of this offence is liable on conviction on indictment to imprisonment for a term not exceeding two years, or a fine, or both, and on summary conviction to imprisonment for a term not exceeding six months, or a fine not exceeding the statutory maximum, or both: Sch 4 para 4(7).

'Statutory maximum', with reference to a fine or penalty on summary conviction for an offence, is the prescribed sum within the meaning of the Magistrates' Courts Act 1980 s 32: see the Interpretation Act 1978 s 5, Sch 1 (definition added by the Criminal Justice Act 1988 s 170(1), Sch 15 para 58); and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 140. 'Prescribed sum' means £5,000 or such sum as is for the time being substituted in this definition by order under the Magistrates' Courts Act 1980 s 143(1): see s 32(9) (amended by the Criminal Justice Act 1991 s 17(2)); and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 141.

## UPDATE

### 203 Form and content of applications for registration

NOTE 2--SI 2007/1253 Sch 8 substituted: SI 2010/1063. Now, the Public Guardian must not register an instrument where only a certified copy of the instrument is sent with the application, unless the applicant verifies that he cannot produce the original instrument because it has been lost or, as the case may be, destroyed: SI 2007/1253 reg 24(1A) (added by SI 2010/1063). SI 2007/1253 reg 24(2) amended: SI 2010/1063. A fee is also payable for an office copy of an enduring power of attorney: SI 2007/2051 reg 4A, Schedule (reg 4A added, Schedule amended, by SI 2009/514). 'Office copy' means a true copy of the original marked by the Public Guardian as being an office copy: SI 2007/2051 reg 2 (definition added by SI 2009/514).

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/9. LASTING AND ENDURING POWERS OF ATTORNEY/(2) ENDURING POWERS OF ATTORNEY/(iii) Activation and Operation of Power/204. Objections to registration.

### 204. Objections to registration.

A notice of objection to the registration of an instrument creating an enduring power<sup>1</sup> is valid if the objection is made on one or more of the following grounds:

- 66 (1) that the power purported to have been created by the instrument was not valid as an enduring power of attorney<sup>2</sup>;
- 67 (2) that the power created by the instrument no longer subsists<sup>3</sup>;
- 68 (3) that the application is premature because the donor is not yet becoming mentally incapable<sup>4</sup>;
- 69 (4) that fraud or undue pressure was used to induce the donor to create the power<sup>5</sup>; and
- 70 (5) that the attorney is unsuitable to be the donor's attorney, having regard to all the circumstances and in particular the attorney's relationship to or connection with the donor<sup>6</sup>.

If any of these grounds is established to the satisfaction of the court<sup>7</sup> it must direct the Public Guardian not to register the instrument<sup>8</sup>, but if not so satisfied it must direct its registration<sup>9</sup>.

1    le an enduring power of attorney for the purposes of the Mental Capacity Act 2005 Sch 4: see PARA 195 note 1. For the duty to register an enduring power see PARA 199 et seq. As to the giving of notices see PARA 198 note 9. The provisions of Sch 4 referred to in this paragraph (see the text and notes 2-9) make provision for the operation of enduring powers of attorney after 1 October 2007 corresponding to the provision made in respect of the operation of those powers before that date by the Enduring Powers of Attorney Act 1985 ss 6(5), (7), (8), 11(5)(c), (6), Sch 3 para 4 (repealed).

2    Mental Capacity Act 2005 Sch 4 para 13(9)(a). The test as to whether or not a power is validly created is not the same as the test for whether it has ceased to be exercisable; the test of validity is whether at the time of execution the donor understood the nature and effect of the power and not whether he would have been able to perform all the acts which the power authorised: *Re K* [1988] Ch 310, [1988] 1 All ER 358. See *Re W (Enduring Power of Attorney)* [2001] Ch 609, [2001] 4 All ER 88, CA (the onus is on the objector to show that the donor lacked the capacity to execute the power of attorney).

3    Mental Capacity Act 2005 Sch 4 para 13(9)(b). Where an objection is made on the ground that the power in respect of which registration is sought has already been revoked, the onus is on the objector to show that the

donor, by his or her conduct, must have intended such revocation: *Re E (Enduring Power of Attorney)* [2001] Ch 364, sub nom *Re E, X v Y* [2000] 3 All ER 1004.

4 Mental Capacity Act 2005 Sch 4 para 13(9)(c). As to the meaning of 'mentally incapable' and cognate expressions see PARA 195 note 2.

5 Mental Capacity Act 2005 Sch 4 para 13(9)(d).

6 Mental Capacity Act 2005 Sch 4 para 13(9)(e). See *Re W (Enduring Power of Attorney)* [2000] Ch 343, [1999] 2 FLR 1163 (hostility between siblings does not necessarily mean that one of them is an unsuitable attorney for a parent, provided the estate is simple). See also *Re E (Enduring Power of Attorney)* [2001] Ch 364, sub nom *Re E, X v Y* [2000] 3 All ER 1004; and as to intervention by the Public Guardian on grounds of unsuitability see PARA 214. For the purposes of joint attorneys (see PARA 196), the Mental Capacity Act 2005 Sch 4 para 13 has effect as if the ground of objection specified in Sch 4 para 13(9)(e) applied to any attorney under the power: Sch 4 para 21(3). For the purposes of joint and several attorneys, where one or more but not both or all of the attorneys make or join in making an application for registration of the instrument, objection may validly be taken on a ground relating to an attorney or to the power of an attorney who is not an applicant as well as to one or the power of one who is an applicant: Sch 4 para 20(5)(c). As to the Public Guardian see the Mental Capacity Act 2005 ss 57-60; and **MENTAL HEALTH** vol 30(2) (Reissue) PARAS 761-763.

7 I.e. the Court of Protection: see PARA 198 note 6. For specific procedural provision in connection with the matters herein referred to see the Court of Protection Rules 2007, SI 2007/1744, r 68.

8 If the court directs the Public Guardian not to register an instrument because it is satisfied that the ground in the Mental Capacity Act 2005 Sch 4 para 13(9)(d) or (e) (see the text and notes 5-6) is established, it must by order revoke the power created by the instrument (Sch 4 para 13(11)); and if the court directs the Public Guardian not to register an instrument because it is satisfied that any ground in Sch 4 para 13(9)(a), (b), (d) or (e) (see the text and notes 1-3, 5-6) is established, the instrument must be delivered up to be cancelled unless the court otherwise directs (Sch 4 para 13(12)).

9 Mental Capacity Act 2005 Sch 4 para 13(10). As to the role of objections in the registration process see further PARA 205.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/9. LASTING AND ENDURING POWERS OF ATTORNEY/(2) ENDURING POWERS OF ATTORNEY/(iii) Activation and Operation of Power/205. Dealing with objections.

## 205. Dealing with objections.

If, in the case of an application for the registration of an instrument creating an enduring power<sup>1</sup>, the Public Guardian<sup>2</sup> has reason to believe that appropriate inquiries might bring to light evidence on which he could be satisfied that one of the grounds of objection<sup>3</sup> was established, he must not register the instrument<sup>4</sup> and must undertake such inquiries as he thinks appropriate in all the circumstances<sup>5</sup>. If having complied with these requirements the Public Guardian is satisfied that one of the grounds of objection is established the attorney may apply to the court<sup>6</sup> for directions<sup>7</sup> and the Public Guardian must not register the instrument except in accordance with the court's directions<sup>8</sup>.

In the case of joint and several attorneys the Public Guardian is not precluded by these provisions from registering an instrument and the court must not direct him not to do so<sup>9</sup> if an enduring power subsists as respects some attorney who is not affected by the ground or grounds of the objection in question; and where the Public Guardian registers an instrument in that case, he must make against the registration an entry in the prescribed form<sup>10</sup>.

1 I.e. an enduring power of attorney for the purposes of the Mental Capacity Act 2005 Sch 4: see PARA 195 note 1. Applications are made to the Public Guardian: see PARA 202. For the duty to register an enduring power see PARA 199 et seq. As to the making of objections to registration see PARA 204. The provisions of Sch 4 referred to in this paragraph (see the text and notes 2-10) make provision for the operation of enduring powers of attorney after 1 October 2007 corresponding to the provision made in respect of the operation of those powers before that date by the Enduring Powers of Attorney Act 1985 s 6(4), (6) (repealed).

2 As to the Public Guardian see the Mental Capacity Act 2005 ss 57-60; and **MENTAL HEALTH** vol 30(2) (Reissue) PARAS 761-763.

3 As to these see the Mental Capacity Act 2005 Sch 4 para 13(9); and PARA 204.

4 Mental Capacity Act 2005 Sch 4 para 13(7)(a). Where the Public Guardian is prevented by virtue of Sch 4 para 13(7) from registering an instrument creating an enduring power of attorney he must notify the person (or persons) who applied for registration of that fact: Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 26(c).

5 Mental Capacity Act 2005 Sch 4 para 13(7)(b).

6 I.e. the Court of Protection: see PARA 198 note 6. For specific procedural provision in connection with the matters herein referred to see the Court of Protection Rules 2007, SI 2007/1744, r 68.

7 Mental Capacity Act 2005 Sch 4 para 13(8)(a).

8 Mental Capacity Act 2005 Sch 4 para 13(8)(b). For a case where the question of inquiries on objections came before the court see *Re C (Power of Attorney)* [2000] 2 FLR 1, CA.

9 I.e. under the Mental Capacity Act 2005 Sch 4 para 13(10) (see PARA 204).

10 Mental Capacity Act 2005 Sch 4 para 20(6). This does not, however, preclude the court from revoking a power in so far as it confers a power on any other attorney in respect of whom the ground in Sch 4 para 13(9) (d) or (e) (see PARA 204) is established; and where any ground in Sch 4 para 13(9) affecting any other attorney is established the court must direct the Public Guardian to make against the registration an entry in the prescribed form: Sch 4 para 20(7). In a case within Sch 4 para 20(6) or (7) the form of the entry to be made in the register of enduring powers (see PARA 206) in respect of an instrument creating the enduring power of attorney is a stamp bearing the following words (inserting the information indicated, as appropriate): 'THE REGISTRATION OF THIS ENDURING POWER OF ATTORNEY IS QUALIFIED AND EXTENDS TO THE APPOINTMENT OF [insert name of attorney(s) not affected by ground(s) of objection or revocation] ONLY AS THE ATTORNEY(S) OF [insert name of donor]': Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 28.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/9. LASTING AND ENDURING POWERS OF ATTORNEY/(2) ENDURING POWERS OF ATTORNEY/(iii) Activation and Operation of Power/206. Registering the instrument.

## **206. Registering the instrument.**

If an application for the registration of an instrument creating an enduring power<sup>1</sup> is made in accordance with the requirements concerning the giving of notification to the donor and family members<sup>2</sup> and complying with the statutory requirements as to the form and content of application<sup>3</sup>, the Public Guardian<sup>4</sup> must register the instrument to which the application relates<sup>5</sup>. This is, however, subject to specific additional requirements if:

- 71 (1) there is a person already appointed to make decisions on behalf of the donor<sup>6</sup>;
- 72 (2) there is no-one to whom notice of intended registration has been given<sup>7</sup>;
- 73 (3) the Public Guardian receives<sup>8</sup> a valid notice of objection to the registration<sup>9</sup> from a person entitled to notice of the application<sup>10</sup>; or
- 74 (4) the Public Guardian has reason to believe that there may be grounds for objection<sup>11</sup>; or
- 75 (5) the instrument to be registered which is sent with the application is neither the original instrument creating the power nor a certified copy<sup>12</sup>.

Where the Public Guardian registers an instrument creating an enduring power of attorney he must retain a copy of the instrument<sup>13</sup> and return to the person (or persons) who applied for

registration the original instrument, or the certified copy<sup>14</sup> of it, which accompanied the application<sup>15</sup>. The Public Guardian also has the function of establishing and maintaining a register of enduring powers for these purposes<sup>16</sup>.

1     le an enduring power of attorney for the purposes of the Mental Capacity Act 2005 Sch 4: see PARA 195 note 1. Applications are made to the Public Guardian: see PARA 202. For the duty to register an enduring power see PARA 199 et seq. The provisions of Sch 4 referred to in this paragraph (see the text and notes 2-16) make provision for the operation of enduring powers of attorney after 1 October 2007 corresponding to the provision made in respect of the operation of those powers before that date by the Enduring Powers of Attorney Act 1985 s 6(1), (2), (7), (8) (repealed).

2     le the requirements of the Mental Capacity Act 2005 Sch 4 para 4(3) (see PARAS 200-201). Provision is made for the registration of an instrument where it appears from the application that there is no one to whom notice of intended registration has been given (see the text and note 7) and, in certain circumstances, notwithstanding the failure to give such notice (see Sch 4 para 13(3); and PARA 207).

3     le the requirements of the Mental Capacity Act 2005 Sch 4 para 4(4) (see PARA 203).

4     As to the Public Guardian see the Mental Capacity Act 2005 ss 57-60; and **MENTAL HEALTH** vol 30(2) (Reissue) PARAS 761-763.

5     Mental Capacity Act 2005 Sch 4 para 13(1).

6     If it appears to the Public Guardian that there is a person already appointed to make decisions on behalf of the donor of the power created by the instrument (a 'deputy') and the powers conferred on the deputy would, if the instrument were registered, to any extent conflict with the powers conferred on the attorney, the Public Guardian must not register the instrument except in accordance with the court's directions: Sch 4 para 13(2). 'Court' means the Court of Protection: see PARA 198 note 6. For specific procedural provision in connection with the matters herein referred to see the Court of Protection Rules 2007, SI 2007/1744, r 68. As to deputies see the Mental Capacity Act 2005 s 16 et seq; and **MENTAL HEALTH** vol 30(2) (Reissue) PARA 757 et seq. Where the Public Guardian is prevented by virtue of Sch 4 para 13(2) from registering an instrument creating an enduring power of attorney he must notify the person (or persons) who applied for registration of that fact: Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 26(a).

7     le if, in the case of an application for registration, it appears from the application that there is no one to whom notice has been given under the Mental Capacity Act 2005 Sch 4 para 5 (see PARA 201) (Sch 4 para 13(6) (a)), the Public Guardian must not register the instrument (Sch 4 para 13(7)(a)) and must undertake such inquiries as he thinks appropriate in all the circumstances (Sch 4 para 13(7)(b)). If having complied with this requirement the Public Guardian is satisfied that one of the grounds of objection (see Sch 4 para 13(9); and PARA 204) is established the attorney may apply to the court for directions (Sch 4 para 13(8)(a)) and the Public Guardian must not register the instrument except in accordance with the court's directions (Sch 4 para 13(8) (b)). As to the giving of notices see PARA 198 note 9.

8     le within the applicable time limits, that is, before the end of the period of five weeks beginning with the date (or the latest date) on which the attorney gave notice under the Mental Capacity Act 2005 Sch 4 para 5 (see PARA 201) of an application for registration: Sch 4 para 13(4). A notice of objection under this provision must be given in writing, setting out the name and address of the objector, the name and address of the donor of the power (if different), the name and address of the attorney (or attorneys) (if known) and the ground for making the objection: Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 25.

An application for the exercise of a power under the Enduring Powers of Attorney Act 1985 (repealed) which is pending immediately before 1 October 2007 (see note 1; and PARA 194) is to be treated, in so far as a corresponding power is exercisable under the Mental Capacity Act 2005 Sch 4, as an application for the exercise of that power, and accordingly a notice of objection to the registration of an instrument is to be treated as a notice of objection under these provisions: Sch 5 para 12(1), (2)(b).

9     As to the circumstances in which a notice of objection to registration is valid see PARA 204.

10    In these circumstances the Public Guardian must not register the instrument except in accordance with the court's directions: Mental Capacity Act 2005 Sch 4 para 13(5). In connection with this see also the Court of Protection Rules 2007, SI 2007/1744, r 201. Where the Public Guardian is prevented by virtue of Sch 4 para 13(5) from registering an instrument creating an enduring power of attorney he must notify the person (or persons) who applied for registration of that fact: Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 26(b).

11 As to the registration of instruments where objections have been made see PARA 205.

12 Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 24(2). 'Certified copy', in relation to an enduring power of attorney, means a copy certified in accordance with the Powers of Attorney Act 1971 s 3 (see PARA 17): Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, regs 24(3), 27(2). The Public Guardian must not register such an instrument unless the court directs him to do so (reg 24(2)); where the Public Guardian is prevented by virtue of reg 24(2) from registering an instrument creating an enduring power of attorney he must notify the person (or persons) who applied for registration of that fact (reg 26(d)).

13 Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 27(1)(a).

14 See note 12.

15 Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 27(1)(b).

16 Mental Capacity Act 2005 Sch 4 para 14. As to the administration of the register by the Public Guardian see the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, regs 30-32; and **MENTAL HEALTH**.

## **UPDATE**

### **206 Registering the instrument**

NOTE 16--SI 2007/1253 reg 32 amended: SI 2009/1884.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/9. LASTING AND ENDURING POWERS OF ATTORNEY/(2) ENDURING POWERS OF ATTORNEY/(iii) Activation and Operation of Power/207. Registration notwithstanding failure to give notice.

### **207. Registration notwithstanding failure to give notice.**

If an application for the registration of an instrument creating an enduring power<sup>1</sup> is made<sup>2</sup> but the statutory requirements concerning the giving of notification of intended registration to the donor and family members<sup>3</sup> have not been complied with, the court<sup>4</sup> may, on the application of the attorney, direct the Public Guardian to register the instrument<sup>5</sup> if the court is satisfied that it was undesirable or impracticable for the attorney to give notice to that person<sup>6</sup> or that no useful purpose is likely to be served by giving him notice<sup>7</sup>. Provision is made for the registration of an instrument where it appears from the application that there is no one to whom notice of intended registration has been given<sup>8</sup>.

1 Ie an enduring power of attorney for the purposes of the Mental Capacity Act 2005 Sch 4: see PARA 195 note 1. For the duty to register an enduring power see PARA 199 et seq. The provisions of Sch 4 referred to in this paragraph (see the text and notes 2-8) make provision for the operation of enduring powers of attorney after 1 October 2007 corresponding to the provision made in respect of the operation of those powers before that date by the Enduring Powers of Attorney Act 1985 s 6(3) (repealed).

2 Applications are made to the Public Guardian: see PARA 202. As to the Public Guardian see the Mental Capacity Act 2005 ss 57-60; and **MENTAL HEALTH** vol 30(2) (Reissue) PARAS 761-763.

3 Ie the requirements of the Mental Capacity Act 2005 Sch 4 paras 4(3), 5-12 (see PARAS 200-202). As to the giving of notices see PARA 198 note 9.

4 Ie the Court of Protection: see PARA 198 note 6. For specific procedural provision in connection with the matters herein referred to see the Court of Protection Rules 2007, SI 2007/1744, r 68.

5     le notwithstanding the non-compliance referred to in the text and specified as a prerequisite for registration by the Mental Capacity Act 2005 Sch 4 para 13(1) (see PARA 206).

6     Mental Capacity Act 2005 Sch 4 para 13(3)(a).

7     Mental Capacity Act 2005 Sch 4 para 13(3)(b).

8     See the Mental Capacity Act 2005 Sch 4 para 13(6)(a), (7); and PARA 206.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/9. LASTING AND ENDURING POWERS OF ATTORNEY/(2) ENDURING POWERS OF ATTORNEY/(iii) Activation and Operation of Power/208. Proof of registration.

### **208. Proof of registration.**

A document purporting to be an office copy of a registered instrument creating an enduring power<sup>1</sup> is evidence of the contents of the instrument and of the fact that it has been so registered<sup>2</sup>.

1     le an enduring power of attorney for the purposes of the Mental Capacity Act 2005 Sch 4: see PARA 195 note 1. As to registration see Sch 4 para 13; and PARAS 206-207. The provisions of Sch 4 referred to in this paragraph (see the text and note 2) make provision for the operation of enduring powers of attorney after 1 October 2007 corresponding to the provision made in respect of the operation of those powers before that date by the Enduring Powers of Attorney Act 1985 s 7(3), (4) (repealed).

2     Mental Capacity Act 2005 Sch 4 para 15(3). This is without prejudice to the Powers of Attorney Act 1971 s 3 (proof by certified copies; see PARA 17): Mental Capacity Act 2005 Sch 4 para 15(4).

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/9. LASTING AND ENDURING POWERS OF ATTORNEY/(2) ENDURING POWERS OF ATTORNEY/(iii) Activation and Operation of Power/209. Effect of registration.

### **209. Effect of registration.**

The effect of the registration of an instrument creating an enduring power<sup>1</sup> is that:

- 76   (1)   no revocation of the power by the donor is valid unless and until the court<sup>2</sup> confirms<sup>3</sup> the revocation<sup>4</sup>;
- 77   (2)   no disclaimer of the power is valid unless and until the attorney gives notice<sup>5</sup> of it to the court<sup>6</sup>; and
- 78   (3)   the donor may not extend or restrict the scope of the authority conferred by the instrument and no instruction or consent given by him after registration may confer any right on, impose or confer any obligation on or create any liability of the attorney or other persons having notice of the instruction or consent<sup>7</sup>.

These provisions apply for so long as the instrument is registered<sup>8</sup> whether or not the donor is for the time being mentally incapable<sup>9</sup>.

1     le an enduring power of attorney for the purposes of the Mental Capacity Act 2005 Sch 4: see PARA 195 note 1. For the duty to register an enduring power see PARA 199 et seq. The provisions of Sch 4 referred to in this paragraph (see the text and notes 2-9) make provision for the operation of enduring powers of attorney

after 1 October 2007 corresponding to the provision made in respect of the operation of those powers before that date by the Enduring Powers of Attorney Act 1985 ss 7(1), (2), 9(5) (repealed).

2    Ie the Court of Protection: see PARA 198 note 6.

3    Ie under the Mental Capacity Act 2005 Sch 4 para 16(3) (see PARA 211). For specific procedural provision in connection with these matters see the Court of Protection Rules 2007, SI 2007/1744, r 68.

4    Mental Capacity Act 2005 Sch 4 para 15(1)(a). For the purposes of the Powers of Attorney Act 1971 s 5 (protection where power is revoked: see PARA 193) in its application to an enduring power the revocation of which by the donor is by virtue of these provisions invalid unless and until confirmed by the court (ie under the Mental Capacity Act 2005 Sch 4 para 16), knowledge of the confirmation of the revocation is knowledge of the revocation of the power but knowledge of the unconfirmed revocation is not: Sch 4 para 18(5).

5    As to the giving of notices see PARA 198 note 9. As to the duty to give notice of disclaimer to the donor where the Mental Capacity Act 2005 Sch 4 para 15(1) and Sch 4 para 4(6) (see PARA 200) do not apply see Sch 4 para 2(10); and PARA 198.

6    Mental Capacity Act 2005 Sch 4 para 15(1)(b).

7    Mental Capacity Act 2005 Sch 4 para 15(1)(c).

8    Ie under the Mental Capacity Act 2005 Sch 4 para 13 (see PARAS 206-207).

9    Mental Capacity Act 2005 Sch 4 para 15(2). As to the meaning of 'mentally incapable' and cognate expressions see PARA 195 note 2.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/9. LASTING AND ENDURING POWERS OF ATTORNEY/(2) ENDURING POWERS OF ATTORNEY/(iii) Activation and Operation of Power/210. Cancellation of registration.

## **210. Cancellation of registration.**

The Public Guardian<sup>1</sup> must cancel the registration of an instrument creating an enduring power<sup>2</sup>:

- 79   (1)   on receipt of a disclaimer signed by the attorney<sup>3</sup>;
- 80   (2)   if satisfied that the power has been revoked by the death or bankruptcy<sup>4</sup> of the donor or attorney or, if the attorney is a body corporate, by its winding up or dissolution<sup>5</sup>;
- 81   (3)   on receipt of notification from the court<sup>6</sup> that the court has revoked the power<sup>7</sup>;
- 82   (4)   on confirmation from the court that the donor has revoked the power<sup>8</sup>.

1    As to the Public Guardian see the Mental Capacity Act 2005 ss 57-60; and **MENTAL HEALTH** vol 30(2) (Reissue) PARAS 761-763.

2    Ie an enduring power of attorney for the purposes of the Mental Capacity Act 2005 Sch 4: see PARA 195 note 1. The provisions of Sch 4 referred to in this paragraph (see the text and notes 3-8) make provision for the operation of enduring powers of attorney after 1 October 2007; no corresponding provisions applied under the Enduring Powers of Attorney Act 1985 (repealed) in respect of the operation of those powers before that date.

3    Mental Capacity Act 2005 Sch 4 para 17(a). As to the revocation, suspension and disclaimer of enduring powers see PARA 198. In the case of joint attorneys, references in these provisions to 'the attorney' include references to any attorney under the power: Sch 4 para 21(6).

4    As to the meaning of 'bankruptcy' see PARA 196 note 3.

5    Mental Capacity Act 2005 Sch 4 para 17(b). As to revocation following the bankruptcy of the donor or attorney see PARA 198.



6    le the Court of Protection: see PARA 198 note 6.

7    Mental Capacity Act 2005 Sch 4 para 17(c). For the court's power of revocation see PARA 212.

8    Mental Capacity Act 2005 Sch 4 para 17(d). For the donor's power of revocation see PARA 212.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/9. LASTING AND ENDURING POWERS OF ATTORNEY/(2) ENDURING POWERS OF ATTORNEY/(iv) Administration of Power and Protection of Parties/211. Interpretation and administration of enduring power.

## **(iv) Administration of Power and Protection of Parties**

### **211. Interpretation and administration of enduring power.**

Where an instrument creating an enduring power<sup>1</sup> has been registered<sup>2</sup> the court<sup>3</sup> may<sup>4</sup>:

- 83    (1)    determine any question as to the meaning or effect of the instrument<sup>5</sup>;
- 84    (2)    give directions with respect to the management or disposal by the attorney<sup>6</sup> of the property and affairs of the donor<sup>7</sup>;
- 85    (3)    give directions with respect to the rendering of accounts by the attorney and the production of records kept by him for accounting purposes<sup>8</sup>;
- 86    (4)    give directions with respect to the remuneration or expenses of the attorney<sup>9</sup>;
- 87    (5)    require the attorney to supply information or produce documents or things in his possession as attorney<sup>10</sup>;
- 88    (6)    give any consent or authorisation to act which the attorney would have to obtain from a mentally capable<sup>11</sup> donor<sup>12</sup>;
- 89    (7)    authorise the attorney to act so as to benefit himself or persons other than the donor, otherwise than in accordance with the statutory provisions<sup>13</sup> relating to the attorney's authority under the power<sup>14</sup>; and
- 90    (8)    relieve the attorney wholly or partly from any liability which he has or may have incurred on account of a breach of his duties as attorney<sup>15</sup>.

1    le an enduring power of attorney for the purposes of the Mental Capacity Act 2005 Sch 4: see PARA 195 note 1. The provisions of Sch 4 referred to in this paragraph (see the text and notes 2-15) make provision for the operation of enduring powers of attorney after 1 October 2007 corresponding to the provision made in respect of the operation of those powers before that date by the Enduring Powers of Attorney Act 1985 s 8(1), (2), Sch 3 para 5 (repealed).

2    le under the Mental Capacity Act 2005 Sch 4 para 13 (see PARAS 206-207).

3    le the Court of Protection: see PARA 198 note 6. For specific procedural provision in connection with these matters see the Court of Protection Rules 2007, SI 2007/1744, r 68.

An application for the exercise of a power under the Enduring Powers of Attorney Act 1985 (repealed) which is pending immediately before 1 October 2007 (see note 1; and PARA 194) is to be treated, in so far as a corresponding power is exercisable under the Mental Capacity Act 2005 Sch 4, as an application for the exercise of that power, and accordingly pending proceedings under the Enduring Powers of Attorney Act 1985 s 5 (repealed) are to be treated as proceedings on an application for the exercise by the court of a power which would become exercisable in relation to an instrument under these provisions on its registration: Mental Capacity Act 2005 Sch 5 para 12(1), (2)(c).

4    Mental Capacity Act 2005 Sch 4 para 16(1).

5    Mental Capacity Act 2005 Sch 4 para 16(2)(a).

6    For the purposes of joint attorneys (see PARA 196), the references in the Mental Capacity Act 2005 Sch 4 para 16(2) to the attorney include references to any attorney under the power: Sch 4 para 21(4).

7 Mental Capacity Act 2005 Sch 4 para 16(2)(b)(i). This does not give the court power to direct the disposal of property of the donor by way of gift or in recognition of a moral obligation unaccompanied by any legal obligation: *Re R (Enduring Power of Attorney)* [1990] Ch 647, [1990] 2 All ER 893.

8 Mental Capacity Act 2005 Sch 4 para 16(2)(b)(ii).

9 Mental Capacity Act 2005 Sch 4 para 16(2)(b)(iii). Such directions may be given whether or not in default of or in accordance with any provision made by the instrument, and may include directions for the repayment of excessive remuneration or the payment of additional remuneration: Sch 4 para 16(2)(b)(iii).

10 Mental Capacity Act 2005 Sch 4 para 16(2)(c).

11 As to the meaning of 'mentally capable' and cognate expressions see PARA 195 note 2.

12 Mental Capacity Act 2005 Sch 4 para 16(2)(d).

13 I.e. the Mental Capacity Act 2005 Sch 4 para 3(2), (3) (see PARA 195).

14 Mental Capacity Act 2005 Sch 4 para 16(2)(e). The exercise of this power is subject to any conditions or restrictions contained in the instrument: Sch 4 para 16(2)(e).

15 Mental Capacity Act 2005 Sch 4 para 16(2)(f).

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/9. LASTING AND ENDURING POWERS OF ATTORNEY/(2) ENDURING POWERS OF ATTORNEY/(iv) Administration of Power and Protection of Parties/212. Revocation of the power at request of donor.

## **212. Revocation of the power at request of donor.**

Where an instrument creating an enduring power<sup>1</sup> has been registered<sup>2</sup> and the court<sup>3</sup> is satisfied that the donor has done whatever is necessary in law to effect an express revocation of the power<sup>4</sup> and was mentally capable<sup>5</sup> of revoking a power of attorney when he did so (whether or not he is so when the court considers the application)<sup>6</sup>, the court must, on an application made for the purpose by or on behalf of the donor, confirm the revocation of the power<sup>7</sup>.

1 I.e. an enduring power of attorney for the purposes of the Mental Capacity Act 2005 Sch 4: see PARA 195 note 1. The provisions of Sch 4 referred to in this paragraph (see the text and notes 2-7) make provision for the operation of enduring powers of attorney after 1 October 2007 corresponding to the provision made in respect of the operation of those powers before that date by the Enduring Powers of Attorney Act 1985 ss 8(1), (3), (4) (a) (repealed).

2 I.e. under the Mental Capacity Act 2005 Sch 4 para 13 (see PARAS 206-207).

3 I.e. the Court of Protection: see PARA 198 note 6. For specific procedural provision in connection with these matters see the Court of Protection Rules 2007, SI 2007/1744, r 68.

4 Mental Capacity Act 2005 Sch 4 para 16(3)(a).

5 As to the meaning of 'mentally capable' and cognate expressions see PARA 195 note 2.

6 Mental Capacity Act 2005 Sch 4 para 16(3)(b).

7 Mental Capacity Act 2005 Sch 4 para 16(3). The court must direct the Public Guardian to cancel the registration of an instrument creating an enduring power on confirming the revocation of the power under these provisions: see Sch 4 para 16(4)(a); and PARA 213. The Public Guardian must cancel the registration of an instrument creating an enduring power on receipt of notification from the court that the court or the donor has revoked the power: see Sch 4 para 17(c), (d); and PARA 210. As to the protection of the attorney and third persons in respect of acts done pursuant to a power so revoked see PARA 216. As to the Public Guardian see ss 57-60; and **MENTAL HEALTH** vol 30(2) (Reissue) PARAS 761-763.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/9. LASTING AND ENDURING POWERS OF ATTORNEY/(2) ENDURING POWERS OF ATTORNEY/(iv) Administration of Power and Protection of Parties/213. Cancellation of the power.

### 213. Cancellation of the power.

The court<sup>1</sup> must direct the Public Guardian<sup>2</sup> to cancel the registration of an instrument creating an enduring power<sup>3</sup>:

- 91 (1) on confirming<sup>4</sup> the revocation of the power<sup>5</sup>;
- 92 (2) on giving a direction<sup>6</sup> that the power is to be revoked<sup>7</sup>;
- 93 (3) on being satisfied that the donor is and is likely to remain mentally capable<sup>8</sup>;
- 94 (4) on being satisfied that the power has expired or has been revoked by the mental incapacity of the attorney<sup>9</sup>;
- 95 (5) on being satisfied that the power was not a valid and subsisting enduring power when registration was effected<sup>10</sup>;
- 96 (6) on being satisfied that fraud or undue pressure was used to induce the donor to create the power<sup>11</sup>; or
- 97 (7) on being satisfied that, having regard to all the circumstances and in particular the attorney's relationship to or connection with the donor, the attorney is unsuitable to be the donor's attorney<sup>12</sup>.

If the court directs the cancellation of the registration of an instrument in any of the circumstances described above (other than on being satisfied that the donor is and is likely to remain mentally capable<sup>13</sup>) the instrument must, unless the court otherwise directs, be delivered up to the Public Guardian to be cancelled<sup>14</sup>. If the court directs the Public Guardian to cancel the registration of an instrument on being satisfied that fraud or undue pressure was used to induce the donor to create the power<sup>15</sup> or that the attorney is unsuitable<sup>16</sup>, it must by order revoke the power created by the instrument<sup>17</sup>.

1    Ie the Court of Protection: see PARA 198 note 6. For specific procedural provision in connection with these matters see the Court of Protection Rules 2007, SI 2007/1744, r 68.

2    As to the Public Guardian see the Mental Capacity Act 2005 ss 57-60; and **MENTAL HEALTH** vol 30(2) (Reissue) PARAS 761-763.

3    Ie an enduring power of attorney for the purposes of the Mental Capacity Act 2005 Sch 4: see PARA 195 note 1. For the duty to register an enduring power see PARA 199 et seq. The provisions of Sch 4 referred to in this paragraph (see the text and notes 4-17) make provision for the operation of enduring powers of attorney after 1 October 2007 corresponding to the provision made in respect of the operation of those powers before that date by the Enduring Powers of Attorney Act 1985 s 8(1), (4)-(6), Sch 3 para 6 (repealed).

4    Ie under the Mental Capacity Act 2005 Sch 4 para 16(3) (see PARA 212).

5    Mental Capacity Act 2005 Sch 4 para 16(4)(a).

6    Ie under the Mental Capacity Act 2005 Sch 4 para 2(9) (see PARA 198).

7    Mental Capacity Act 2005 Sch 4 para 16(4)(b).

8    Mental Capacity Act 2005 Sch 4 para 16(4)(c). As to the meaning of 'mentally capable' and cognate expressions see PARA 195 note 2.

9 Mental Capacity Act 2005 Sch 4 para 16(4)(d). For the purposes of joint attorneys (see PARA 196) the references in Sch 4 para 16(4) to 'the attorney' include references to any attorney under the power: Sch 4 para 21(5).

10 Mental Capacity Act 2005 Sch 4 para 16(4)(e). As to the characteristics of a valid enduring power see PARAS 196-197.

11 Mental Capacity Act 2005 Sch 4 para 16(4)(f).

12 Mental Capacity Act 2005 Sch 4 para 16(4)(g). For a case where the question of the power to cancel registration on the grounds of unsuitability came before the court see *Re C (Power of Attorney)* [2000] 2 FLR 1, CA; and as to intervention by the Public Guardian on grounds of unsuitability see PARA 214.

13 Ie under the Mental Capacity Act 2005 Sch 4 para 16(4)(c) (see the text and note 8).

14 Mental Capacity Act 2005 Sch 4 para 16(6). Where a person is required by or under the Mental Capacity Act 2005 to deliver up to the Public Guardian an instrument registered as an enduring power of attorney, an office copy of that registered instrument or a certified copy of that registered instrument, and the document has been lost or destroyed (Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 29(1)), the person required to deliver up the document must provide to the Public Guardian in writing either the date of the loss or destruction and the circumstances in which it occurred (if known) or a statement of when he last had the document in his possession (reg 29(2)).

15 Ie under the matters referred to in the Mental Capacity Act 2005 Sch 4 para 16(4)(f) (see the text and note 11).

16 Ie under the matters referred to in the Mental Capacity Act 2005 Sch 4 para 16(4)(g) (see the text and note 12).

17 Mental Capacity Act 2005 Sch 4 para 16(5).

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/9. LASTING AND ENDURING POWERS OF ATTORNEY/(2) ENDURING POWERS OF ATTORNEY/(iv) Administration of Power and Protection of Parties/214. Intervention by Public Guardian.

## **214. Intervention by Public Guardian.**

Where it appears to the Public Guardian<sup>1</sup> that there are circumstances suggesting that, having regard to all the circumstances (and in particular the attorney's relationship to or connection with the donor) the attorney under a registered enduring power of attorney<sup>2</sup> may be unsuitable to be the donor's attorney, he may require the attorney:

- 98 (1) to provide specified information or information of a specified description<sup>3</sup>; or
- 99 (2) to produce specified documents or documents of a specified description<sup>4</sup>,

and may require any information so provided to be verified, and any document so produced to be authenticated, in such manner as he may reasonably require<sup>5</sup>.

The Public Guardian may also direct a Court of Protection Visitor<sup>6</sup> to visit an attorney under a registered enduring power of attorney, or to visit the donor of such a power, and to make a report to the Public Guardian on such matters as he may direct<sup>7</sup>, and also has power to deal with representations (including complaints) about the way in which an attorney under a registered enduring power is exercising his powers<sup>8</sup>.

<sup>1</sup> As to the Public Guardian see the Mental Capacity Act 2005 ss 57-60; and **MENTAL HEALTH** vol 30(2) (Reissue) PARAS 761-763.

2     le an enduring power of attorney for the purposes of the Mental Capacity Act 2005 Sch 4: see PARA 195 note 1. For the duty to register an enduring power see PARA 199 et seq.

3     Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 47(1), (2)(a). 'Specified' means specified in a notice in writing given to the attorney by the Public Guardian: reg 47(5). The information or documents must be provided or produced before the end of such reasonable period as may be specified (reg 47(3)(a)) and at such place as may be specified (reg 47(3)(b)).

4     Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 47(2)(b). See note 3.

5     Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 47(4).

6     As to Court of Protection Visitors see the Mental Capacity Act 2005 s 61; and **MENTAL HEALTH** vol 30(2) (Reissue) PARA 764.

7     Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 48(a).

8     Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 48(b).

## UPDATE

### 214 Intervention by Public Guardian

TEXT AND NOTES 7-8--SI 2007/1253 reg 48(a), (b) renumbered as reg 48(1)(a), (b): SI 2010/1063. Now, the functions conferred by SI 2007/1253, reg 48 (1) may be discharged in co-operation with any other person who has functions in relation to the care or treatment of the donor: reg 48(2) (added by SI 2010/1063).

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/9. LASTING AND ENDURING POWERS OF ATTORNEY/(2) ENDURING POWERS OF ATTORNEY/(iv) Administration of Power and Protection of Parties/215. Acts done in pursuance of invalid power.

### 215. Acts done in pursuance of invalid power.

Where an instrument which did not create a valid enduring power of attorney<sup>1</sup> has been registered<sup>2</sup>, an attorney who acts in pursuance of the power does not incur any liability, either to the donor or to any other person, by reason of the non-existence of the power unless at the time of acting he knows that:

- 100 (1) the instrument did not create a valid enduring power<sup>3</sup>;
- 101 (2) an event has occurred which, if the instrument had created a valid enduring power, would have had the effect of revoking the power<sup>4</sup>; or
- 102 (3) if the instrument had created a valid enduring power, the power would have expired before the time of acting<sup>5</sup>;

and any transaction between the attorney and another person is valid in favour of that person as if the power had then been in existence, unless at the time of the transaction that person had knowledge of any of the matters previously mentioned above<sup>6</sup>.

1     le an enduring power of attorney for the purposes of the Mental Capacity Act 2005 Sch 4: see PARA 195 note 1. As to the characteristics of a valid enduring power see PARAS 196-197. The provisions of Sch 4 referred

to in this paragraph (see the text and notes 2-6) make provision for the operation of enduring powers of attorney after 1 October 2007 corresponding to the provision made in respect of the operation of those powers before that date by the Enduring Powers of Attorney Act 1985 s 9(1)-(4), (7) (repealed).

2     le under the Mental Capacity Act 2005 Sch 4 para 13 (see PARA 206): Sch 4 para 18(1). These provisions apply whether or not the registration has been cancelled at the time of the act or transaction in question: Sch 4 para 18(1).

3     Mental Capacity Act 2005 Sch 4 para 18(2)(a).

4     Mental Capacity Act 2005 Sch 4 para 18(2)(b).

5     Mental Capacity Act 2005 Sch 4 para 18(2)(c).

6     Mental Capacity Act 2005 Sch 4 para 18(3). Where the interest of a purchaser depends on whether a transaction between the attorney and another person was valid by virtue of Sch 4 para 18(3), it is conclusively presumed in favour of the purchaser that the transaction was valid if the transaction between that person and the attorney was completed within 12 months of the date on which the instrument was registered (Sch 4 para 18(4)(a)) and that person makes a statutory declaration, before or within three months after the completion of the purchase, that he had no reason at the time of the transaction to doubt that the attorney had authority to dispose of the property which was the subject of the transaction (Sch 4 para 18(4)(b)). As to the meanings of 'purchaser' and 'purchase' see the Law of Property Act 1925 s 205(1); and **SALE OF LAND** vol 42 (Reissue) PARA 55; definition applied by the Mental Capacity Act 2005 s 64(1).

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/9. LASTING AND ENDURING POWERS OF ATTORNEY/(2) ENDURING POWERS OF ATTORNEY/(iv) Administration of Power and Protection of Parties/216. Acts done in pursuance of revoked power.

## **216. Acts done in pursuance of revoked power.**

Where an instrument in the prescribed form<sup>1</sup> creates a power which is not a valid enduring power<sup>2</sup> and the power is revoked by the donor's mental incapacity<sup>3</sup>, then, whether or not the instrument has been registered<sup>4</sup>:

103 (1)     an attorney who acts in pursuance of the power does not, by reason of the revocation, incur any liability either to the donor or to any other person<sup>5</sup>; and

104 (2)     any transaction between the attorney and another person is valid in favour of that person as if the power had then been in existence<sup>6</sup>,

unless at the time of acting or, as the case may be, the time of the transaction the attorney or the other person knows that the instrument did not create a valid enduring power and that the donor had become mentally incapable<sup>7</sup>.

1     As to the prescribed form for these purposes see PARA 197 note 2.

2     le a valid enduring power of attorney for the purposes of the Mental Capacity Act 2005 Sch 4: see PARA 195 note 1. As to the characteristics of a valid enduring power see PARAS 196-197. The provisions of Sch 4 referred to in this paragraph (see the text and notes 2-7) make provision for the operation of enduring powers of attorney after 1 October 2007 corresponding to the provision made in respect of the operation of those powers before that date by the Enduring Powers of Attorney Act 1985 Sch 2 (repealed).

3     As to the meaning of 'mental incapacity' and cognate expressions see PARA 195 note 2. As to revocation on these grounds see PARA 212.

4     Mental Capacity Act 2005 Sch 4 para 19(1).

5     Mental Capacity Act 2005 Sch 4 para 19(2).

6     Mental Capacity Act 2005 Sch 4 para 19(3).

7 Mental Capacity Act 2005 Sch 4 para 19(2), (3). Where the interest of a purchaser depends on whether a transaction between the attorney and another person was valid by virtue of Sch 4 para 19(3), it is conclusively presumed in favour of the purchaser that the transaction was valid if the transaction between that person and the attorney was completed within 12 months of the date on which the instrument was registered (Sch 4 paras 18(4)(a), 19(4)) and that person makes a statutory declaration, before or within three months after the completion of the purchase, that he had no reason at the time of the transaction to doubt that the attorney had authority to dispose of the property which was the subject of the transaction (Sch 4 para 18(4)(b)). As to the meanings of 'purchaser' and 'purchase' see the Law of Property Act 1925 s 205(1); and sale of land vol 42 (Reissue) para 55; definition applied by the Mental Capacity Act 2005 s 64(1).

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/9. LASTING AND ENDURING POWERS OF ATTORNEY/(3) LASTING POWERS OF ATTORNEY/(i) Nature and Effect of Power/217. Effect of lasting power.

### **(3) LASTING POWERS OF ATTORNEY**

#### **(i) Nature and Effect of Power**

##### **217. Effect of lasting power.**

A lasting power of attorney<sup>1</sup> is a power of attorney under which the donor confers on the donee or donees authority to make decisions<sup>2</sup> about all or any of the donor's personal welfare, property<sup>3</sup> and affairs or specified matters concerning his personal welfare, property and affairs, and which includes authority to make such decisions in circumstances where the donor no longer has capacity<sup>4</sup>.

Where a lasting power authorises the donee<sup>5</sup> to make decisions about the donor's personal welfare, the authority:

- 105 (1) does not extend to making such decisions in circumstances other than those where the donor lacks, or the donee reasonably believes that the donor lacks, capacity<sup>6</sup>;
- 106 (2) is subject to the statutory provisions concerning advance decisions to refuse treatment<sup>7</sup>; and
- 107 (3) extends to giving or refusing consent to the carrying out or continuation of a treatment<sup>8</sup> by a person providing health care for the donor<sup>9</sup>.

A lasting power also does not authorise the donee<sup>10</sup> to do an act that is intended to restrain the donor<sup>11</sup> unless:

- 108 (a) the donor lacks, or the donee reasonably believes that he lacks, capacity in relation to the matter in question<sup>12</sup>;
- 109 (b) the donee reasonably believes that it is necessary to do the act in order to prevent harm to the donor<sup>13</sup>; and
- 110 (c) the act is a proportionate response to the likelihood of the donor suffering harm<sup>14</sup> and the seriousness of that harm<sup>15</sup>.

Where a lasting power confers authority to make decisions about the donor's property and affairs, it does not authorise a donee<sup>16</sup> to dispose of the donor's property by making gifts<sup>17</sup> other than:

- 111 (i) on customary occasions<sup>18</sup> to persons (including himself) who are related to or connected with the donor<sup>19</sup>; or
- 112 (ii) to any charity to whom the donor made or might have been expected to make gifts<sup>20</sup>,

provided that the value of any such gift is not unreasonable having regard to all the circumstances and, in particular, the size of the donor's estate<sup>21</sup>.

An instrument which purports to create a lasting power of attorney but does not comply with the requirements concerning the authority and appointment of the donee<sup>22</sup> or the making and registration of instruments<sup>23</sup> confers no authority<sup>24</sup>. Moreover, the authority conferred by a lasting power is subject to the statutory provisions relating to persons who lack capacity<sup>25</sup> (with particular regard to the principles of that legislation<sup>26</sup> and the provisions concerned with the determination of a person's best interests<sup>27</sup>) and any conditions or restrictions in the instrument conferring the power<sup>28</sup>.

1 The power to confer lasting powers of attorney under the Mental Capacity Act 2005 ss 9-14, Sch 1 (see the text and notes 2-28; and PARAS 218-238) came into effect on 1 October 2007: see the Mental Capacity Act 2005 (Commencement No 2) Order 2007, SI 2007/1897. It replaced the power to confer enduring powers of attorney under the Enduring Powers of Attorney Act 1985 (repealed), which ceased on that date: see further PARA 194.

2 References to 'making decisions', in relation to a donee of a lasting power of attorney, include, where appropriate, acting on decisions made: Mental Capacity Act 2005 s 64(2).

3 As to the meaning of 'property' see PARA 195 note 11.

4 Mental Capacity Act 2005 s 9(1). As to the meaning of 'capacity' and cognate expressions see PARA 195 note 2.

5 Or, if more than one, any of them: Mental Capacity Act 2005 s 11(7).

6 Mental Capacity Act 2005 s 11(7)(a).

7 Mental Capacity Act 2005 s 11(7)(b). The statutory provisions concerning advance decisions to refuse treatment are ss 24-26; as to which see **MENTAL HEALTH** vol 30(2) (Reissue) PARAS 653-655.

8 'Treatment' includes a diagnostic or other procedure: Mental Capacity Act 2005 s 64(1).

9 Mental Capacity Act 2005 s 11(7)(c). This does not, however, authorise the giving or refusing of consent to the carrying out or continuation of life-sustaining treatment, unless the instrument contains express provision to that effect (s 11(8)(a)) and is subject to any conditions or restrictions in the instrument (s 11(8)(b)). 'Life-sustaining treatment' means treatment which in the view of a person providing health care for the person concerned is necessary to sustain life: ss 4(10), 64(1).

10 Or, if more than one, any of them: Mental Capacity Act 2005 s 11(1).

11 For these purposes the donee restrains the donor if he uses, or threatens to use, force to secure the doing of an act which the donor resists (Mental Capacity Act 2005 s 11(5)(a)) or restricts the donor's liberty of movement, whether or not the donor resists (s 11(5)(b)), or if he authorises another person to do any of those things. Until a day to be appointed the donee does more than merely restrain the donor if he deprives the donor of his liberty within the meaning of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969), art 5(1) (see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 127 et seq): Mental Capacity Act 2005 s 11(6) (prospectively repealed by the Mental Health Act 2007 ss 50(1), (4)(b), 55, Sch 11 Pt 10). At the date at which this volume states the law no such day had been appointed. For new controls on deprivation of liberty see the Mental Capacity Act 2005 ss 4A, 4B, 16A; and **MENTAL HEALTH**.

12 Mental Capacity Act 2005 s 11(2).

13 Mental Capacity Act 2005 s 11(3).

14 Mental Capacity Act 2005 s 11(4)(a).



15 Mental Capacity Act 2005 s 11(4)(b).

16 Or, if more than one, any of them: Mental Capacity Act 2005 s 12(1).

17 Mental Capacity Act 2005 s 12(1).

18 'Customary occasion' means the occasion or anniversary of a birth, a marriage or the formation of a civil partnership or any other occasion on which presents are customarily given within families or among friends or associates: Mental Capacity Act 2005 s 12(3).

19 Mental Capacity Act 2005 s 12(2)(a). The power to make limited gifts conferred by s 12(2) is subject to any conditions or restrictions in the instrument conferring the lasting power: s 12(4). The court (ie the Court of Protection: see PARA 198 note 6) may authorise the making of gifts which are not within s 12(2): see s 23(4); and PARA 235.

20 Mental Capacity Act 2005 s 12(2)(b). See note 19.

21 Mental Capacity Act 2005 s 12(2).

22 Ie the provisions of the Mental Capacity Act 2005 s 9 (see the text and notes 1-4, 23-28) and s 10 (see PARA 218).

23 Ie the Mental Capacity Act 2005 Sch 1 paras 1-3 (making instruments) (see PARAS 219-222), 4-16 (registration) (see PARAS 225-233).

24 Mental Capacity Act 2005 s 9(3).

25 Ie the provisions of the Mental Capacity Act 2005 (see **MENTAL HEALTH** vol 30(2) (Reissue) PARA 641 et seq).

26 Ie the Mental Capacity Act 2005 s 1 (see **MENTAL HEALTH** vol 30(2) (Reissue) PARA 641).

27 Ie the Mental Capacity Act 2005 s 4 (see **MENTAL HEALTH** vol 30(2) (Reissue) PARA 642).

28 Mental Capacity Act 2005 s 9(4).

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/9. LASTING AND ENDURING POWERS OF ATTORNEY/(3) LASTING POWERS OF ATTORNEY/(i) Nature and Effect of Power/218. Characteristics of a lasting power.

## **218. Characteristics of a lasting power.**

A donee of a lasting power of attorney<sup>1</sup> must be an individual who has reached the age of 18<sup>2</sup>, unless the power relates only to the donor's property<sup>3</sup> and affairs, in which case the donee may be either such an individual or a trust corporation<sup>4</sup>. An individual who is bankrupt<sup>5</sup> may not be appointed as donee of a lasting power of attorney in relation to the donor's property and affairs<sup>6</sup>.

An instrument used to create a lasting power of attorney cannot give the donee<sup>7</sup> power to appoint a substitute or successor<sup>8</sup>, although that instrument may itself appoint a person to replace the donee<sup>9</sup> where disclaimer, death, bankruptcy, partnership break-up or incapacity<sup>10</sup> has the effect of terminating the donee's appointment<sup>11</sup>. Provision is also made for circumstances where two or more persons are appointed to act as donees: an instrument appointing two or more persons may appoint them to act jointly, jointly and severally or jointly in respect of some matters and jointly and severally in respect of others<sup>12</sup>. If the donees are to act jointly, a failure as respects one of them to comply with the requirements as to the status of the donee<sup>13</sup> or the making and registration of instruments<sup>14</sup> prevents a lasting power of attorney from being created<sup>15</sup>. If they are to act jointly and severally, such a failure as respects one of them prevents the appointment taking effect in his case<sup>16</sup> but does not prevent a lasting power of attorney from being created in the case of the other or others<sup>17</sup>.

A lasting power is not created unless these provisions<sup>18</sup> and the statutory requirements as to the making and registration of instruments<sup>19</sup> are complied with<sup>20</sup> and at the time when the donor executes the instrument he has reached the age of 18 and has capacity<sup>21</sup> to execute it<sup>22</sup>. The court<sup>23</sup> may determine any question relating to whether one or more of the requirements for the creation of a lasting power of attorney have been met<sup>24</sup>.

- 1 As to the meaning of 'lasting power of attorney' see PARA 217.
- 2 Mental Capacity Act 2005 s 10(1)(a).
- 3 As to the meaning of 'property' see PARA 195 note 11.
- 4 Mental Capacity Act 2005 s 10(1)(b). As to the meaning of 'trust corporation' see PARA 196 note 4.
- 5 As to references in the Mental Capacity Act 2005 to the 'bankruptcy' of an individual see PARA 196 note 3.
- 6 Mental Capacity Act 2005 s 10(2).
- 7 Or, if more than one, any of them: Mental Capacity Act 2005 s 10(8)(a).
- 8 Mental Capacity Act 2005 s 10(8)(a).
- 9 Or, if more than one, any of them: Mental Capacity Act 2005 s 10(8)(b).
- 10 Ie an event mentioned in the Mental Capacity Act 2005 s 13(6)(a)-(d) (see PARA 234).
- 11 Mental Capacity Act 2005 s 10(8)(b).
- 12 Mental Capacity Act 2005 s 10(3), (4). To the extent to which it does not specify whether they are to act jointly or jointly and severally, the instrument is to be assumed to appoint them to act jointly: s 10(5).
- 13 Ie the Mental Capacity Act 2005 s 10(1), (2) (see the text and notes 1-6).
- 14 Ie the Mental Capacity Act 2005 Sch 1 paras 1-3 (making instruments) (see PARAS 219-222), 4-16 (registration) (see PARAS 225-233).
- 15 Mental Capacity Act 2005 s 10(6).
- 16 Mental Capacity Act 2005 s 10(7)(a).
- 17 Mental Capacity Act 2005 s 10(7)(b).
- 18 Ie the Mental Capacity Act 2005 s 10 (see the text and notes 1-17).
- 19 Ie the Mental Capacity Act 2005 Sch 1 paras 1-3 (making instruments) (see PARAS 219-222), 4-16 (registration) (see PARAS 225-233).
- 20 Mental Capacity Act 2005 s 9(2)(a), (b).
- 21 As to the meaning of 'capacity' and cognate expressions see PARA 195 note 2.
- 22 Mental Capacity Act 2005 s 9(2)(c).
- 23 Ie the Court of Protection: see PARA 198 note 6.
- 24 See PARA 236.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/9. LASTING AND ENDURING POWERS OF ATTORNEY/(3) LASTING POWERS OF ATTORNEY/(ii) Creation, Revocation and Disclaimer of Power/219. Form of instrument.

## **(ii) Creation, Revocation and Disclaimer of Power**

## 219. Form of instrument.

An instrument conferring a lasting power of attorney<sup>1</sup> must be in the form prescribed by regulations<sup>2</sup>. Two different forms are prescribed as the forms which, in the circumstances to which they apply, are to be used for instruments intended to create a lasting power<sup>3</sup>, one to be used for an instrument intended to create a property and affairs power<sup>4</sup> and the other for an instrument intended to create a personal welfare power<sup>5</sup>. The instrument must include the information contained in the form which appears under the heading 'prescribed information' and concerns the purpose of the instrument and the effect of a lasting power<sup>6</sup>.

If an instrument differs in an immaterial respect in form from the prescribed form, it is to be treated by the Public Guardian<sup>7</sup> as sufficient in point of form and expression<sup>8</sup>; moreover the court<sup>9</sup> may declare that an instrument which is not in the prescribed form is to be treated as if it were, if it is satisfied that the persons executing the instrument intended it to create a lasting power of attorney<sup>10</sup>. Provision is also made for the use of Welsh language forms<sup>11</sup>.

An instrument which does not comply with these provisions does not create a lasting power of attorney<sup>12</sup>.

1 As to the meaning of 'lasting power of attorney' see PARA 217.

2 Mental Capacity Act 2005 Sch 1 para 1(1)(a), (3). As to the making of regulations under the Mental Capacity Act 2005 generally see s 65; and **MENTAL HEALTH** vol 30(2) (Reissue) PARA 406.

3 Mental Capacity Act 2005 Sch 1 para 1(2)(a); Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 5.

4 See the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, Sch 1 Pt 1.

5 See the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, Sch 1 Pt 2.

6 Mental Capacity Act 2005 Sch 1 para 1(1)(b), (2)(a); Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 2(1).

7 As to the Public Guardian see the Mental Capacity Act 2005 ss 57-60; and **MENTAL HEALTH** vol 30(2) (Reissue) PARAS 761-763.

8 Mental Capacity Act 2005 Sch 1 para 3(1).

9 Ie the Court of Protection: see PARA 198 note 6.

10 Mental Capacity Act 2005 Sch 1 para 3(2).

11 See the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 3(1)(a).

12 See the Mental Capacity Act 2005 s 9(2)(b); and PARA 218.

### UPDATE

## 219 Form of instrument

NOTES 4, 5--SI 2007/1253 Sch 1 substituted: SI 2009/1884.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/9. LASTING AND ENDURING POWERS OF ATTORNEY/(3) LASTING POWERS OF ATTORNEY/(ii) Creation, Revocation and Disclaimer of Power/220. Statements to be included in instrument.

## 220. Statements to be included in instrument.

An instrument conferring a lasting power of attorney<sup>1</sup> must include, in addition to the prescribed information<sup>2</sup>, two statements by the donor:

- 113 (1) to the effect that he has read the prescribed information or a prescribed part of it (or has had it read to him)<sup>3</sup> and intends the authority conferred under the instrument to include authority to make decisions<sup>4</sup> on his behalf in circumstances where he no longer has capacity<sup>5</sup>; and
- 114 (2) either naming a person or persons whom the donor wishes to be notified of any application for the registration of the instrument<sup>6</sup> or stating that there are no persons whom he wishes to be notified of any such application<sup>7</sup>.

The instrument must also include a statement by the donee<sup>8</sup> to the effect that he has read the prescribed information or a prescribed part of it (or has had it read to him)<sup>9</sup> and understands the duties imposed on a donee of a lasting power by the principles of the legislation relating to persons who lack capacity<sup>10</sup> and under the provisions concerned with the determination of a person's best interests<sup>11</sup>.

An instrument which does not comply with these provisions does not create a lasting power of attorney<sup>12</sup>.

1 As to the meaning of 'lasting power of attorney' see PARA 217.

2 As to the prescribed information see PARA 219.

3 Mental Capacity Act 2005 Sch 1 paras 1(1)(b), 2(1)(b)(i).

4 As to references to the making of decisions see PARA 217 note 2.

5 Mental Capacity Act 2005 Sch 1 para 2(1)(b)(ii). As to the meaning of 'capacity' and cognate expressions see PARA 195 note 2.

6 Mental Capacity Act 2005 Sch 1 para 2(1)(c)(i). As to registration see PARA 225 et seq. The persons who may be named persons do not include a person who is appointed as donee under the instrument (Sch 1 para 2(3)), and the maximum number of named persons that the donor of a lasting power of attorney may specify in the instrument intended to create the power is five (Sch 1 para 2(2)(a); Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 6).

7 Mental Capacity Act 2005 Sch 1 para 2(1)(c)(ii). Where the donor states that there are no persons whom he wishes to be notified an additional LPA certificate is required: see Sch 1 para 2(2)(b); the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 7; and PARA 221.

8 Or, if more than one, each of them: Mental Capacity Act 2005 Sch 1 para 2(1)(d).

9 Mental Capacity Act 2005 Sch 1 para 2(1)(d)(i).

10 Ie by the Mental Capacity Act 2005 s 1 (see **MENTAL HEALTH** vol 30(2) (Reissue) PARA 641).

11 Mental Capacity Act 2005 Sch 1 para 2(1)(d)(ii). The provisions of the legislation relating to persons who lack capacity which are concerned with the determination of such a person's best interests are s 4 (see **MENTAL HEALTH** vol 30(2) (Reissue) PARA 642).

12 See the Mental Capacity Act 2005 s 9(2)(b); and PARA 218.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/9. LASTING AND ENDURING POWERS OF ATTORNEY/(3) LASTING POWERS OF ATTORNEY/(ii) Creation, Revocation and Disclaimer of Power/221. Certificate to be included in instrument.

## **221. Certificate to be included in instrument.**

An instrument conferring a lasting power of attorney<sup>1</sup> must include, in addition to the prescribed information<sup>2</sup> and the donor's and donee's statements<sup>3</sup>, an LPA certificate<sup>4</sup>, that is, a certificate that, in the opinion of the person making the certificate, at the time when the donor executes the instrument:

- 115 (1) the donor understands the purpose of the instrument and the scope of the authority conferred under it<sup>5</sup>;
- 116 (2) no fraud or undue pressure is being used to induce the donor to create a lasting power of attorney<sup>6</sup>; and
- 117 (3) there is nothing else which would prevent a lasting power of attorney from being created by the instrument<sup>7</sup>.

Where an instrument includes a statement by the donor that there are no persons whom he wishes to be notified of any application for the registration of the instrument<sup>8</sup> the instrument must include two LPA certificates<sup>9</sup> and each certificate must be completed and signed by a different person<sup>10</sup>.

An LPA certificate may be given by a person chosen by the donor as being someone who has known him personally for the period of at least two years which ends immediately before the date on which that person signs the certificate<sup>11</sup> or a person so chosen who, on account of his professional skills and expertise, reasonably considers that he is competent to make the judgments necessary to certify the matters set out above<sup>12</sup>. The certificate may not be given by a person appointed as donee under the instrument<sup>13</sup> or any other similar power<sup>14</sup> or by specified family members and persons professionally associated with the donor<sup>15</sup>.

An instrument which does not comply with these provisions does not create a lasting power of attorney<sup>16</sup>.

1 As to the meaning of 'lasting power of attorney' see PARA 217.

2 As to the prescribed information see PARA 219.

3 As to these see PARA 220.

4 Provision is made requiring an LPA certificate to be made in the form, and to include information, prescribed by regulations: Mental Capacity Act 2005 Sch 1 para 2(5). At the date at which the law no such form or information had been prescribed. As to the making of regulations under the Mental Capacity Act 2005 generally see s 65; and **MENTAL HEALTH** vol 30(2) (Reissue) PARA 406.

5 Mental Capacity Act 2005 Sch 1 para 2(1)(e)(i).

6 Mental Capacity Act 2005 Sch 1 para 2(1)(e)(ii).

7 Mental Capacity Act 2005 Sch 1 para 2(1)(e)(iii).

8 See the Mental Capacity Act 2005 Sch 1 para 2(1)(c)(ii); and PARA 220.

9 Mental Capacity Act 2005 Sch 1 para 2(2)(b); Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 7(a).

10 Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 7(b).

11 Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 8(1)(a).

12 Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 8(1)(b). Examples of such a person are a registered health care professional, a barrister, solicitor or advocate called or admitted in any part of the United Kingdom, a registered social worker or an independent mental capacity advocate: reg 8(2). 'Registered health care professional' means a person who is a member of a profession regulated by a body mentioned in the National Health Service Reform and Health Care Professions Act 2002 s 25(3) (see **MEDICAL PROFESSIONS** vol 30(1) (Reissue) PARA 294); and 'registered social worker' means a person registered as a social worker in a register maintained by the General Social Care Council (see **SOCIAL SERVICES AND COMMUNITY CARE**), the Care Council for Wales (see **SOCIAL SERVICES AND COMMUNITY CARE**), the Scottish Social Services Council or the Northern Ireland Social Care Council: Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 8(4).

13 Mental Capacity Act 2005 Sch 1 para 2(6); Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 8(3)(b).

14 Ie a donee of any other lasting power of attorney or an enduring power of attorney (see PARA 195 et seq) which has been executed by the donor (whether or not it has been revoked): Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 8(3)(c).

15 Ie the certificate may not be given by:

28 (1) a family member of the donor (Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 8(3)(a));

29 (2) a family member of the donee (reg 8(3)(d));

30 (3) a director or employee of a trust corporation acting as a donee under the power (reg 8(3)(e));

31 (4) a business partner or employee of the donor or a donee under the power (reg 8(3)(f)); and

32 (5) an owner, director, manager or employee of any care home in which the donor is living when the instrument is executed or a family member of any such person (reg 8(3)(g), (h)).

As to the meaning of 'care home' see the Care Standards Act 2000 s 3; and **CHILDREN AND YOUNG PERSONS** vol 5(4) (2008 Reissue) PARA 985; definition applied by the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 8(4).

16 See the Mental Capacity Act 2005 s 9(2)(b); and PARA 218.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/9. LASTING AND ENDURING POWERS OF ATTORNEY/(3) LASTING POWERS OF ATTORNEY/(ii) Creation, Revocation and Disclaimer of Power/222. Execution of instrument.

## 222. Execution of instrument.

The procedure for the execution of an instrument intending to create a lasting power of attorney<sup>1</sup> is:

118 (1) the donor must read (or have read to him) all the prescribed information<sup>2</sup>;

119 (2) the donor must complete the provisions of the instrument<sup>3</sup> that apply to him (or direct another person to do so)<sup>4</sup> and sign<sup>5</sup> the relevant part<sup>6</sup> in the presence of a witness<sup>7</sup>;

120 (3) the person or persons giving an LPA certificate<sup>8</sup> must complete<sup>9</sup> and sign it<sup>10</sup>;

121 (4) the donee<sup>11</sup> must read (or have read to him) all the prescribed information<sup>12</sup>; and

122 (5) the donee<sup>13</sup> must complete the provisions of the instrument<sup>14</sup> that apply to him (or direct another person to do so)<sup>15</sup> and must sign the relevant part<sup>16</sup> in the presence of a witness<sup>17</sup>.

Each of these steps must be taken as soon as reasonably practicable after the previously required step has been taken<sup>18</sup>. An instrument which does not comply with these provisions does not create a lasting power of attorney<sup>19</sup>.

1 As to the meaning of 'lasting power of attorney' see PARA 217.

2 Mental Capacity Act 2005 Sch 1 para 1(1)(c); Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 9(1), (2). As to the prescribed information see PARA 219.

3 Ie the provisions of Pt A of the instrument: Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 9(3)(a).

4 Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 9(3)(a).

5 Any reference in these provisions to a person 'signing' an instrument (however expressed) includes his signing it by means of a mark made on the instrument at the appropriate place: Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 9(10).

6 See note 3.

7 Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 9(3)(b). The donor may not witness any signature required for the power, and a donee may not witness any signature required for the power apart from that of another donee: reg 9(8). A person witnessing a signature must sign the instrument and give his full name and address: reg 9(9). If the instrument is to be signed by any person at the direction of the donor or any donee the signature must be done in the presence of two witnesses: reg 9(7).

8 As to the meaning of 'LPA certificate' see PARA 221. If the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 7 (two LPA certificates required: see PARA 221) applies, this requirement applies to each of the persons giving a certificate: reg 9(4)(b).

9 Ie at Pt B of the instrument: Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 9(4).

10 Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 9(4)(a).

11 Or if more than one, each of the donees: Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 9(5)(b).

12 Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 9(5)(a).

13 Or if more than one, each of the donees: Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 9(6).

14 Ie the provisions of Pt C of the instrument: Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 9(6)(a).

15 Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 9(6)(a).

16 See note 14.

17 Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 9(6)(b). See reg 9(7)-(9); and note 7.

18 Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 9(3)-(6).

19 See the Mental Capacity Act 2005 s 9(2)(b); and PARA 218.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/9. LASTING AND ENDURING POWERS OF ATTORNEY/(3) LASTING POWERS OF ATTORNEY/(ii) Creation, Revocation and Disclaimer of Power/223. Revocation of lasting power by donor or court.

### 223. Revocation of lasting power by donor or court.

The donor may, at any time when he has capacity<sup>1</sup> to do so, revoke an instrument executed with a view to creating a lasting power of attorney<sup>2</sup>. The donor's bankruptcy<sup>3</sup> also revokes the instrument so far as it relates to his property<sup>4</sup> and affairs<sup>5</sup>.

The court<sup>6</sup> may revoke an instrument purporting to create a lasting power of attorney, if the donor lacks capacity to do so<sup>7</sup>, if it is satisfied either:

- 123 (1) that fraud or undue pressure was used to induce the donor to execute an instrument for the purpose of creating a lasting power or to create a lasting power<sup>8</sup>; or
- 124 (2) that the donee<sup>9</sup> of a lasting power has behaved, or is behaving, in a way that contravenes his authority or is not in the donor's best interests or proposes to behave in such a way<sup>10</sup>.

The court may also on these grounds direct that an instrument purporting to create a lasting power is not to be registered<sup>11</sup>, and may determine any question relating to whether a power has been revoked or has otherwise come to an end<sup>12</sup>.

1 As to the meaning of 'capacity' and cognate expressions see PARA 195 note 2.

2 Mental Capacity Act 2005 s 13(1)(a), (2). As to the meaning of 'lasting power of attorney' see PARA 217. As to the execution of instruments with a view to creating lasting powers see PARA 222.

A donor who revokes a lasting power of attorney must notify the Public Guardian that he has done so (Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 21(1)(a)) and notify the donee (or, if more than one, each of them) of the revocation (reg 21(1)(b)). The Public Guardian may also require the donor to provide such further information, or produce such documents, as he reasonably considers necessary to enable him to determine whether the steps necessary for revocation have been taken: reg 21(3). As to the Public Guardian see the Mental Capacity Act 2005 ss 57-60; and **MENTAL HEALTH** vol 30(2) (Reissue) PARAS 761-763.

3 As to references in the Mental Capacity Act 2005 to the 'bankruptcy' of an individual see PARA 196 note 3.

4 As to the meaning of 'property' see PARA 195 note 11.

5 Mental Capacity Act 2005 s 13(3). If the donor is bankrupt merely because an interim bankruptcy restrictions order under the Insolvency Act 1986 (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY**) has effect in respect of him, the power is suspended, so far as it relates to the donor's property and affairs, for so long as the order has effect: Mental Capacity Act 2005 s 13(4).

6 I.e. the Court of Protection: see PARA 198 note 6. For specific procedural provision in connection with the matters herein referred to see the Court of Protection Rules 2007, SI 2007/1744, r 67.

7 Mental Capacity Act 2005 s 22(4)(b). If there is more than one donee, the court may under this provision revoke the instrument or the lasting power so far as it relates to any of them: s 22(5). 'Donee' includes an intended donee: s 22(6).

8 Mental Capacity Act 2005 s 22(3)(a).

9 Or, if more than one, any of them: Mental Capacity Act 2005 s 22(3)(b). See note 7.



10 Mental Capacity Act 2005 s 22(3)(b). As to intervention by the Public Guardian for the purpose of safeguarding the donor's best interests and monitoring the donee's behaviour see PARA 237.

11 See PARA 230.

12 See PARA 236.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/9. LASTING AND ENDURING POWERS OF ATTORNEY/(3) LASTING POWERS OF ATTORNEY/(ii) Creation, Revocation and Disclaimer of Power/224. Termination of donee's appointment.

## **224. Termination of donee's appointment.**

The donee's appointment is terminated<sup>1</sup> if:

- 125 (1) he disclaims it<sup>2</sup>;
- 126 (2) he dies or is bankrupt<sup>3</sup>;
- 127 (3) the donee is a trust corporation<sup>4</sup> and is wound up or dissolved<sup>5</sup>;
- 128 (4) a marriage or civil partnership between the donor and the donee is dissolved or annulled<sup>6</sup>; or
- 129 (5) the donee lacks capacity<sup>7</sup>.

The occurrence in relation to a donee of any of these events will also revoke an instrument creating a lasting power of attorney<sup>8</sup> unless the donee is replaced under the terms of the instrument<sup>9</sup> or he is one of two or more persons appointed to act as donees jointly and severally in respect of any matter and, after the event, there is at least one remaining donee<sup>10</sup>. Additionally:

- 130 (a) the donee's bankruptcy neither terminates his appointment nor revokes the instrument in so far as his authority relates to the donor's personal welfare<sup>11</sup>;
- 131 (b) where the donee is bankrupt merely because an interim bankruptcy restrictions order has effect in respect of him, his appointment and the instrument are suspended, so far as they relate to the donor's property and affairs, for so long as the order has effect<sup>12</sup>; and
- 132 (c) the dissolution or annulment of a marriage or civil partnership does not terminate the appointment of a donee, or revoke the instrument, if the instrument provided that it was not to do so<sup>13</sup>.

1 Mental Capacity Act 2005 s 13(5)(a).

2 Mental Capacity Act 2005 s 13(6)(a). The form which a donee must use to disclaim his appointment as donee has been prescribed (see the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 20(1), Sch 6): the donee must send the completed form to the donor and a copy of it to the Public Guardian and any other donee who, for the time being, is appointed under the power (reg 20(2)). Provision is also made for the use of Welsh language forms (reg 3(1)(a)); forms which differ in an immaterial respect in form or mode of expression from the specified form, forms to the same effect but with such variations as the circumstances may require or the court (ie the Court of Protection: see PARA 198 note 6) or Public Guardian may approve, and Welsh versions of such forms, are also acceptable (reg 3(1)(b)). As to the Public Guardian see the Mental Capacity Act 2005 ss 57-60; and **MENTAL HEALTH** vol 30(2) (Reissue) PARAS 761-763.

3 Mental Capacity Act 2005 s 13(6)(b). As to references in the Mental Capacity Act 2005 to the 'bankruptcy' of an individual see PARA 196 note 3. In connection with the donee's bankruptcy see also s 13(8), (9); and the text and notes 11-12.

4 As to the meaning of 'trust corporation' see PARA 196 note 4.

- 5 Mental Capacity Act 2005 s 13(6)(b).
- 6 Mental Capacity Act 2005 s 13(6)(c).
- 7 Mental Capacity Act 2005 s 13(6)(d). As to the meaning of 'capacity' and cognate expressions see PARA 195 note 2.
- 8 Mental Capacity Act 2005 s 13(5)(b). As to the meaning of 'lasting power of attorney' see PARA 217. As to the execution of instruments with a view to creating lasting powers see PARA 222.
- 9 Mental Capacity Act 2005 s 13(7)(a).
- 10 Mental Capacity Act 2005 s 13(7)(b).
- 11 Mental Capacity Act 2005 s 13(8).
- 12 Mental Capacity Act 2005 s 13(9). Where the donee is one of two or more appointed to act jointly and severally under the power in respect of any matter, the reference in s 13(9) to the suspension of the power is to its suspension in so far as it relates to that donee: s 13(10).
- 13 Mental Capacity Act 2005 s 13(11).

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/9. LASTING AND ENDURING POWERS OF ATTORNEY/(3) LASTING POWERS OF ATTORNEY/(iii) Activation and Operation of Power/225. Requirement for, and notification of, registration.

### **(iii) Activation and Operation of Power**

#### **225. Requirement for, and notification of, registration.**

A lasting power of attorney<sup>1</sup> is not created unless the instrument conferring the appropriate authority<sup>2</sup> is properly registered<sup>3</sup>. Either the donor or the donee may apply for registration<sup>4</sup>, but may not do so unless they have first notified their intention to the named persons<sup>5</sup> or satisfied the court<sup>6</sup> that no useful purpose would be served by giving such notification<sup>7</sup>. The form of notice which must be given by a donor or donee who is about to make an application for the registration of an instrument intended to create a lasting power of attorney is prescribed by regulations<sup>8</sup>.

If these requirements are not complied with the instrument in question will not create a lasting power of attorney<sup>9</sup>.

- 1 As to the meaning of 'lasting power of attorney' see PARA 217.
- 2 As to authority under a lasting power of attorney see the Mental Capacity Act 2005 s 9(1); and PARA 217.
- 3 Mental Capacity Act 2005 s 9(2)(b).
- 4 Mental Capacity Act 2005 Sch 1 para 4(2)(a), (b). If the instrument appoints two or more donees to act jointly and severally in respect of any matter, any of the donees may apply for registration: Sch 1 para 4(2)(c).
- 5 Mental Capacity Act 2005 Sch 1 para 6. 'Named person' means a person named under Sch 1 para 2(1)(c) (see PARA 220); Sch 1 para 2(4).
- 6 I.e. the Court of Protection: see PARA 198 note 6.
- 7 See the Mental Capacity Act 2005 Sch 1 para 10, which provides that the court may on the application of the donor, donee or donees concerned dispense with the requirement to notify under Sch 1 para 6, if satisfied that no useful purpose would be served by giving the notice).

8 Mental Capacity Act 2005 Sch 1 para 9(1); Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 10, Sch 2. As to the making of regulations under the Mental Capacity Act 2005 generally see s 65; and **MENTAL HEALTH** vol 30(2) (Reissue) PARA 406. It is also provided that a notice under Sch 1 para 6 must include such information, if any, as may be prescribed (Sch 1 para 9(2)). At the date at which this volume states the law no such information had been prescribed.

Provision is also made for the use of Welsh language forms (Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 3(1)(a)); forms which differ in an immaterial respect in form or mode of expression from the specified form, forms to the same effect but with such variations as the circumstances may require or the court or Public Guardian may approve, and Welsh versions of such forms, are also acceptable (reg 3(1)(b)).

9 See the Mental Capacity Act 2005 s 9(2)(b); and PARA 218.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/9. LASTING AND ENDURING POWERS OF ATTORNEY/(3) LASTING POWERS OF ATTORNEY/(iii) Activation and Operation of Power/226. Form and content of applications for registration.

## **226. Form and content of applications for registration.**

The form which must be used for making an application to the Public Guardian<sup>1</sup> for the registration of an instrument intended to create a lasting power of attorney<sup>2</sup> is prescribed by regulations<sup>3</sup>. The application must be accompanied by the instrument intended to be registered<sup>4</sup> and the applicable fee<sup>5</sup>, and the Public Guardian must notify receipt of the application to the donor or donee, as the case may be<sup>6</sup>. Any person who, in an application for registration, makes a statement which he knows to be false in a material particular is guilty of an offence<sup>7</sup>.

If these requirements are not complied with the instrument in question will not create a lasting power of attorney<sup>8</sup>.

1 As to the Public Guardian see the Mental Capacity Act 2005 ss 57-60; and **MENTAL HEALTH** vol 30(2) (Reissue) PARAS 761-763.

2 As to the meaning of 'lasting power of attorney' see PARA 217. Either the donor or the donee (or any of the donees) of a lasting power may apply for it to be registered: see the Mental Capacity Act 2005 Sch 1 para 4(2); and PARA 225.

3 Mental Capacity Act 2005 Sch 1 para 4(1)(a); Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 11(1), Sch 3. As to the making of regulations under the Mental Capacity Act 2005 generally see s 65; and **MENTAL HEALTH** vol 30(2) (Reissue) PARA 406. It is also provided that an application for registration must include such information as may be prescribed (Sch 1 para 4(1)(b)). At the date at which this volume states the law no such information had been prescribed.

Provision is also made for the use of Welsh language forms (Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 3(1)(a)); forms which differ in an immaterial respect in form or mode of expression from the specified form, forms to the same effect but with such variations as the circumstances may require or the court or Public Guardian may approve, and Welsh versions of such forms, are also acceptable (reg 3(1)(b)).

4 Mental Capacity Act 2005 Sch 1 para 4(3)(a). Where the instrument to be registered which is sent with the application is neither the original instrument intended to create the power nor a certified copy of it, the Public Guardian must not register the instrument unless the court (ie the Court of Protection: see PARA 198 note 6) directs him to do so: see the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 11(2); and PARA 231. A 'certified copy' is a photographic or other facsimile copy which is certified as an accurate copy by the donor or a solicitor or notary: regs 11(3), 17(5). Where the Public Guardian is prevented by this provision from registering an instrument as a lasting power of attorney he must notify the person (or persons) who applied for registration of that fact: reg 16(e).

5 Mental Capacity Act 2005 Sch 1 para 4(3)(b). For the applicable fee see the Public Guardian (Fees, etc) Regulations 2007, SI 2007/2051, reg 5, Schedule.

6 Notification that an application has been received must be made as soon as is practicable after receiving the application, and the means of notification depends on the identity of the applicant:

- 33 (1) if the application is made by the donor under the Mental Capacity Act 2005 Sch 1 para 4(2) (a) (see PARA 225), the Public Guardian must notify the donee (or donees) in the form set out in the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, Sch 4 Pt 1 (Mental Capacity Act 2005 Sch 1 para 7; Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 13(1));
- 34 (2) if the application is made by a donee (or donees) under the Mental Capacity Act 2005 Sch 1 para 4(2)(b) (see PARA 225), the Public Guardian must notify the donor in the form set out in the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, Sch 4 Pt 2 (Mental Capacity Act 2005 Sch 1 para 8(1); Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 13(2)); and
- 35 (3) if the application is made by a donee under the Mental Capacity Act 2005 Sch 1 para 4(2) (c) (see PARA 225), the Public Guardian must notify both the donor (in the form set out in the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, Sch 4 Pt 2) and the donees that did not join in the making of the application (in the form set out in the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, Sch 4 Pt 1) (Mental Capacity Act 2005 Sch 1 para 8(2); Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 13(1), (2)).

If the application is made by the donee and it appears to the Public Guardian that there is good reason to do so, the Public Guardian must also provide (or arrange for the provision of) an explanation to the donor of the notice referred to in reg 13(2) and what the effect of it is, and why it is being brought to his attention: Mental Capacity Act 2005 Sch 1 para 9(2); Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 13(3). Any information so provided must be provided to the donor personally and in a way that is appropriate to the donor's circumstances (for example using simple language, visual aids or other appropriate means): reg 13(4). Provision is also made for the use of Welsh language forms (reg 3(1)(a)); forms which differ in an immaterial respect in form or mode of expression from the specified form, forms to the same effect but with such variations as the circumstances may require or the court or Public Guardian may approve, and Welsh versions of such forms, are also acceptable (reg 3(1)(b)).

7 Mental Capacity Act 2005 Sch 1 para 4(4). A person who is found guilty of this offence is liable on conviction on indictment to imprisonment for a term not exceeding two years, or a fine, or both, and on summary conviction to imprisonment for a term not exceeding 12 months, or a fine not exceeding the statutory maximum, or both: Sch 1 para 4(4). As to the statutory maximum see PARA 203 note 3.

8 See the Mental Capacity Act 2005 s 9(2)(b); and PARA 218.

## UPDATE

### 226 Form and content of applications for registration

NOTE 5--A fee is also payable for an office copy (see PARA 203) of a lasting power of attorney: SI 2007/2051 reg 5A, Schedule (reg 5A added, Schedule amended, by SI 2009/514).

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/9. LASTING AND ENDURING POWERS OF ATTORNEY/(3) LASTING POWERS OF ATTORNEY/(iii) Activation and Operation of Power/227. Objections to registration.

### 227. Objections to registration.

The donee of a lasting power of attorney<sup>1</sup>, or a person named for the purposes of such power<sup>2</sup>, may give notice to the Public Guardian<sup>3</sup>, or make an application to the court<sup>4</sup>, objecting to the registration of the instrument creating the power<sup>5</sup>.

The grounds on which the donee or a named person may notify his objection to the Public Guardian are that the instrument has been revoked by:

- 133 (1) the donor's bankruptcy<sup>6</sup>;
- 134 (2) the disclaimer of the appointment by the donee<sup>7</sup>;
- 135 (3) the death or bankruptcy of the donee or, if the donee is a trust corporation<sup>8</sup>, its winding-up or dissolution<sup>9</sup>;
- 136 (4) the dissolution or annulment of a marriage or civil partnership between the donor and the donee<sup>10</sup>; or
- 137 (5) the lack of capacity<sup>11</sup> of the donee<sup>12</sup>.

The grounds on which the donee or a named person may apply to the court objecting to the registration of an instrument as a lasting power of attorney are:

- 138 (a) that one or more of the requirements for the creation of a lasting power of attorney has not been met<sup>13</sup>;
- 139 (b) that the power has been revoked<sup>14</sup>, or has otherwise come to an end, on a ground other than one of the grounds on which an objection to registration may be made to the Public Guardian<sup>15</sup>; and
- 140 (c) any of the specified grounds on which the court may intervene to direct that a lasting power not be registered or to revoke such a power<sup>16</sup>.

The donor of a lasting power may also object to registration by giving notice of his objection to the Public Guardian<sup>17</sup>.

Where an objection is established, the instrument will not be registered unless the court so directs<sup>18</sup>.

1 As to the meaning of 'lasting power of attorney' see PARA 217.

2 I.e. a 'named person': see PARA 225 note 5; and as to such persons see PARA 220.

3 Mental Capacity Act 2005 Sch 1 para 13(1)(b). As to the Public Guardian see the Mental Capacity Act 2005 ss 57-60; and **MENTAL HEALTH** vol 30(2) (Reissue) PARAS 761-763. Notice must be given in writing, setting out the name and address of the objector, the name and address of the donor of the power (if different), the name and address of the donee (or donees) (if known) and the ground for making the objection: Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 14(3) (amended by SI 2007/2161).

4 Mental Capacity Act 2005 Sch 1 para 13(3)(b)(i). The court is the Court of Protection: see PARA 198 note 6. If the donee or named person makes an application to the court under this provision he must notify the Public Guardian in writing of the application: Sch 1 para 13(3)(b)(ii); Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 15(4).

5 Mental Capacity Act 2005 Sch 1 para 13(1)(b), (3)(b)(i). The procedure for making objections differs depending on whether the objection is being made to the Public Guardian or to the court: see PARA 228. Nothing in the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 14 (see the text and notes 1-3; and PARA 228 et seq) prevents an objector from making a further objection under the Mental Capacity Act 2005 Sch 1 para 13 where the notice under the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 14(4) (see PARA 229) indicates that the Public Guardian is not satisfied that the particular ground of objection to which that notice relates is established and the period specified in reg 14(2) (see PARA 228) has not expired: reg 14(7). There are time limits and other procedural matters relating to the making of objections: see reg 14A (added by SI 2007/2161).

6 Mental Capacity Act 2005 Sch 1 para 13(1)(b). As to references in the Mental Capacity Act 2005 to the 'bankruptcy' of an individual see PARA 196 note 3. As to the revocation of an instrument on these grounds see s 13(3); and PARA 233.

7 Mental Capacity Act 2005 Sch 1 para 13(1)(b). As to the revocation of an instrument on these grounds see s 13(6)(a); and PARA 234.

8 As to the meaning of 'trust corporation' see PARA 196 note 4.

9 Mental Capacity Act 2005 Sch 1 para 13(1)(b). As to the revocation of an instrument on these grounds see s 13(6)(b); and PARA 234.

10 Mental Capacity Act 2005 Sch 1 para 13(1)(b). As to the revocation of an instrument on these grounds see s 13(6)(c); and PARA 234.

11 As to the meaning of 'capacity' and cognate expressions see PARA 195 note 2.

12 Mental Capacity Act 2005 Sch 1 para 13(1)(b). As to the revocation of an instrument on these grounds see s 13(6)(d); and PARA 234.

13 Mental Capacity Act 2005 Sch 1 para 13(3)(b)(i); Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 15(1), (2)(a). As to the requirements for the creation of a lasting power of attorney see PARA 218 et seq.

14 As to the revocation of powers see PARA 233.

15 Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 15(2)(b). As to the grounds on which an objection to registration may be made to the Public Guardian see the Mental Capacity Act 2005 Sch 1 para 13(1); and the text and notes 6-12.

16 Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 15(2)(c). As to the specified grounds on which the court may intervene see the Mental Capacity Act 2005 s 22(3); and PARA 233.

17 Mental Capacity Act 2005 Sch 1 para 14(1)(b). Notice must be given in writing, setting out the name and address of the objector, the name and address of the donor of the power (if different), the name and address of the donee (or donees) (if known) and the ground for making the objection: Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 14(3) (amended by SI 2007/2161).

18 See the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, Sch 1 paras 13(2), (4), 14(2); and PARA 229.

## UPDATE

### 227 Objections to registration

NOTE 18--SI 2007/1253 Sch 1 substituted: SI 2009/1884.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/9. LASTING AND ENDURING POWERS OF ATTORNEY/(3) LASTING POWERS OF ATTORNEY/(iii) Activation and Operation of Power/228. Procedure for making objections.

### 228. Procedure for making objections.

Objections to applications for the registration of an instrument as a lasting power of attorney<sup>1</sup> may be made only after the person objecting to the registration has been notified<sup>2</sup> of the application<sup>3</sup>.

A donee or named person<sup>4</sup> who:

- 141 (1) is entitled to receive notice<sup>5</sup> of an application for the registration of an instrument as a lasting power of attorney<sup>6</sup>; and  
 142 (2) wishes to give notice to the Public Guardian<sup>7</sup> that he objects to the registration on a specified ground<sup>8</sup>,

must do so before the end of the period of five weeks beginning with the date on which the notification of application for registration is given<sup>9</sup>. At any time after receiving the notice of objection and before notifying the objector as to whether or not he is satisfied that the ground of the objection is established<sup>10</sup>, the Public Guardian may require the objector to provide such further information, or produce such documents, as the Public Guardian reasonably considers necessary to enable him to determine whether the ground for making the objection is established<sup>11</sup>.

A donor who wishes to give notice to the Public Guardian that he objects to registration must do so before the end of the period of five weeks beginning with the date on which the notification of application for registration is given<sup>12</sup>.

Any person who:

- 143 (a) is entitled to receive notice<sup>13</sup> of an application for the registration of an instrument as a lasting power<sup>14</sup>; and  
 144 (b) wishes to make an application to the court<sup>15</sup> objecting<sup>16</sup> to the registration<sup>17</sup>,

must make the application before the end of the period of five weeks beginning with the date on which the notice is given<sup>18</sup>.

1 As to the meaning of 'lasting power of attorney' see PARA 217. As to the grounds on which objections may be made see PARA 227.

2 Ie under the Mental Capacity Act 2005 Sch 1 para 6, 7 or 8 (see PARAS 225, 226 note 6).

3 Mental Capacity Act 2005 Sch 1 paras 13(1)(a), (3)(a), 14(1)(a).

4 Ie a 'named person': see PARA 225 note 5; and as to such persons see PARA 220.

5 See note 2.

6 Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 14(2)(a) (amended by SI 2007/2161).

7 As to the Public Guardian see the Mental Capacity Act 2005 ss 57-60; and **MENTAL HEALTH** vol 30(2) (Reissue) PARAS 761-763. As to the making of objections to the Public Guardian see PARA 227.

8 Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 14(1), (2)(b) (amended by SI 2007/2161). For the 'specified grounds' for an objection under these provisions see the Mental Capacity Act 2005 Sch 1 para 13(1); and PARA 227.

9 Mental Capacity Act 2005 Sch 1 para 13(1)(b), (3)(b); Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 14(2). Any period of time specified in the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, which is expressed as a number of days must be computed as clear days (reg 4(1), (2)); 'clear days' means that in computing the number of days the day on which the period begins and, if the end of the period is defined by reference to an event, the day on which that event occurs, are not included (reg 4(5)). Where the specified period is seven days or less, and would include a day which is not a business day, that day does not count (reg 4(3)); 'business day' means a day other than a Saturday, Sunday, Christmas Day or Good Friday or a bank holiday under the Banking and Financial Dealings Act 1971 (see **TIME** vol 97 (2010) PARA 321), in England and Wales (reg 4(5)). When the specified period for doing any act at the office of the Public Guardian ends on a day on which the office is closed, that act will be done in time if done on the next day on which the office is open: reg 4(4).

10 le before giving the notice required by the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 14(4) (see PARA 229).

11 Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 14(5).

12 Mental Capacity Act 2005 Sch 1 para 14(1)(b); Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 14(2).

13 See note 2.

14 Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 15(3)(a).

15 The court is the Court of Protection: see PARA 198 note 6. As to applications to the court objecting to registration see PARA 227.

16 le on one or more of the grounds set out in the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 15(2) (see PARA 227).

17 Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 15(3)(b).

18 Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 15(3). As to the computation of time limits see note 9.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/9. LASTING AND ENDURING POWERS OF ATTORNEY/(3) LASTING POWERS OF ATTORNEY/(iii) Activation and Operation of Power/229. Dealing with objections.

## **229. Dealing with objections.**

If the Public Guardian<sup>1</sup> is satisfied, on an objection to the registration of an instrument as a lasting power of attorney<sup>2</sup> being made to him by the donee or a named person<sup>3</sup>, that a ground for making the objection is established<sup>4</sup>, he must not register the instrument unless the court<sup>5</sup>, on the application of the person applying for the registration, is satisfied that the ground is not established and directs the Public Guardian to register the instrument<sup>6</sup>. If the donee or a named person applies to the court objecting to registration<sup>7</sup>, the Public Guardian must not register the instrument unless the court directs him to do so<sup>8</sup>. If the donor gives notice to the Public Guardian of an objection to the registration<sup>9</sup>, the Public Guardian must not register the instrument unless the court, on the application of the donee or, if more than one, any of them, is satisfied that the donor lacks capacity<sup>10</sup> to object to the registration and directs the Public Guardian to register the instrument<sup>11</sup>.

Where the Public Guardian is prevented by these provisions from registering an instrument as a lasting power of attorney he must notify the person (or persons) who applied for registration of that fact<sup>12</sup>.

1 As to the Public Guardian see the Mental Capacity Act 2005 ss 57-60; and **MENTAL HEALTH** vol 30(2) (Reissue) PARAS 761-763.

2 As to the meaning of 'lasting power of attorney' see PARA 217. As to the grounds on which objections may be made, and the procedure for making objections, see PARAS 227-228.

3 le under the Mental Capacity Act 2005 Sch 1 para 13(1) (see PARAS 227-228). As to the meaning of 'named person' see PARA 225 note 5.

4 Where an objection has been notified to the Public Guardian he must notify the objector as to whether or not he is satisfied that the ground of the objection is established (Lasting Powers of Attorney, Enduring Powers



of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 14(4)), although if he is so satisfied but by virtue of the Mental Capacity Act 2005 s 13(7) (see PARA 234) the instrument is not revoked, such notice must contain a statement to that effect (Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 14(6)).

5    Ie the Court of Protection: see PARA 198 note 6. As to applications to the court objecting to registration see PARA 227.

6    Mental Capacity Act 2005 Sch 1 para 13(2).

7    Ie under Sch 1 para 13(3) (see PARAS 227-228).

8    Mental Capacity Act 2005 Sch 1 para 13(4).

9    Ie under the Mental Capacity Act 2005 Sch 1 para 14(1) (see PARAS 227-228).

10   As to the meaning of 'capacity' and cognate expressions see PARA 195 note 2.

11   Mental Capacity Act 2005 Sch 1 para 14(2).

12   Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 16(c), (d).

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/9. LASTING AND ENDURING POWERS OF ATTORNEY/(3) LASTING POWERS OF ATTORNEY/(iii) Activation and Operation of Power/230. Intervention by court.

### **230. Intervention by court.**

The court<sup>1</sup> may direct that an instrument purporting to create a lasting power of attorney<sup>2</sup> is not to be registered<sup>3</sup> if it is satisfied either:

145 (1)   that fraud or undue pressure was used to induce the donor to execute the relevant instrument or to create the lasting power<sup>4</sup>; or

146 (2)   that the donee<sup>5</sup> of a lasting power has behaved, or is behaving, in a way that contravenes his authority or is not in the donor's best interests or proposes to behave in such a way<sup>6</sup>.

If the donor lacks capacity<sup>7</sup> to do so, the court may also revoke the instrument or the lasting power<sup>8</sup>.

1    Ie the Court of Protection: see PARA 198 note 6. For specific procedural provision in connection with the matters herein referred to see the Court of Protection Rules 2007, SI 2007/1744, r 67.

2    Ie where a person has executed or purported to execute an instrument with a view to creating a lasting power of attorney: Mental Capacity Act 2005 s 22(1)(a).

3    Mental Capacity Act 2005 s 22(4)(a).

4    Mental Capacity Act 2005 s 22(3)(a).

5    Or, if more than one, any of them: Mental Capacity Act 2005 s 22(3)(b).

6    Mental Capacity Act 2005 s 22(3)(b). As to intervention by the Public Guardian for the purpose of safeguarding the donor's best interests and monitoring the donee's behaviour see PARA 237. As to the Public Guardian see ss 57-60; and **MENTAL HEALTH** vol 30(2) (Reissue) PARAS 761-763.

7    As to the meaning of 'capacity' and cognate expressions see PARA 195 note 2.

8 Mental Capacity Act 2005 s 22(4)(b). If there is more than one donee, the court may under s 22(4)(b) revoke the instrument or the lasting power of attorney so far as it relates to any of them: s 22(5). 'Donee' includes an intended donee: s 22(6).

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/9. LASTING AND ENDURING POWERS OF ATTORNEY/(3) LASTING POWERS OF ATTORNEY/(iii) Activation and Operation of Power/231. Registering the instrument.

### 231. Registering the instrument.

If the Public Guardian<sup>1</sup> is able to register an instrument as a lasting power of attorney<sup>2</sup> he must do so by the end of the period of six weeks beginning with the date on which he gave the notice or notices<sup>3</sup> of receipt of an application for registration<sup>4</sup>. Registration is, however, subject to the discretion of the court<sup>5</sup> if:

- 147 (1) the instrument accompanying an application for registration is not properly made<sup>6</sup>;
- 148 (2) the instrument contains a provision which would be ineffective as part of a lasting power of attorney or would prevent the instrument from operating as such<sup>7</sup>;
- 149 (3) there is a person already appointed to make decisions on behalf of the donor<sup>8</sup>;
- 150 (4) grounds for objection are established<sup>9</sup>;
- 151 (5) the court is satisfied that it should intervene in the interests of the donor<sup>10</sup>; or
- 152 (6) the instrument which is sent with the registration application is neither the original instrument intended to create the power nor a certified copy of it<sup>11</sup>.

Where the Public Guardian registers an instrument as a lasting power of attorney he must give notice of the fact to the donor and donee<sup>12</sup>. He must also retain a copy of the instrument<sup>13</sup> and return to the person (or persons) who applied for registration the original instrument, or the certified copy<sup>14</sup> of it, which accompanied the application for registration<sup>15</sup>. The Public Guardian also has the function of establishing and maintaining a register of lasting powers for these purposes<sup>16</sup>.

1 As to the Public Guardian see the Mental Capacity Act 2005 ss 57-60; and **MENTAL HEALTH** vol 30(2) (Reissue) PARAS 761-763.

2 As to the meaning of 'lasting power of attorney' see PARA 217. As to applications for registration see PARA 225 et seq. For the circumstances under which the Public Guardian may not be able to register the instrument see the text and notes 5-11.

3 Ie the notice or notices under the Mental Capacity Act 2005 Sch 1 para 7 or 8: see PARA 226 note 6.

4 Mental Capacity Act 2005 Sch 1 para 5; Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 12(a). If notices were given on more than one date, the six week period runs from the latest of those dates: reg 12(b).

5 Ie the Court of Protection: see PARA 198 note 6.

6 See the Mental Capacity Act 2005 Sch 1 para 11(1) (if it appears to the Public Guardian that an instrument accompanying an application under Sch 1 para 4 (see PARAS 225-226) is not made in accordance with this Sch 1, he must not register the instrument unless the court directs him to do so). Where the Public Guardian is prevented by this provision from registering an instrument as a lasting power of attorney he must notify the person (or persons) who applied for registration of that fact: Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 16(a).

7 Mental Capacity Act 2005 Sch 1 para 11(2), (4). If it appears to the Public Guardian that the instrument contains a provision which would be ineffective as part of a lasting power of attorney or would prevent the instrument from operating as a valid lasting power of attorney, he must apply to the court for it to determine the matter under s 23(1) (see PARA 235) and, pending the determination by the court, must not register the instrument: Sch 1 para 11(3). If the court determines under s 23(1) (whether or not on an application by the Public Guardian) that the instrument contains a provision which would be ineffective as part of a lasting power of attorney, or would prevent the instrument from operating as a valid lasting power of attorney, it must notify the Public Guardian that it has severed the provision, or direct him not to register the instrument: Sch 1 para 11(5). Where the court notifies the Public Guardian that it has severed a provision, he must register the instrument with a note to that effect attached to it: Sch 1 para 11(6).

8 If it appears to the Public Guardian that there is a deputy appointed by the court for the donor and the powers conferred on the deputy would, if the instrument were registered, to any extent conflict with the powers conferred on the attorney, the Public Guardian must not register the instrument unless the court directs him to do so: Mental Capacity Act 2005 Sch 1 para 12. Where the Public Guardian is prevented by this provision from registering an instrument as a lasting power of attorney he must notify the person (or persons) who applied for registration of that fact: Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 16(b). As to deputies see the Mental Capacity Act 2005 s 16 et seq; and **MENTAL HEALTH** vol 30(2) (Reissue) PARA 757 et seq.

9 As to the court's discretion concerning the registration of instruments where objections have been made see PARA 229.

10 For the court's power to intervene in cases of fraud or undue influence or abuse of authority see PARA 230.

11 Where the instrument to be registered which is sent with the application is neither the original instrument intended to create the power nor a certified copy of it, the Public Guardian must not register the instrument unless the court directs him to do so: see the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 11(2); and PARA 226. As to the meaning of 'certified copy' see PARA 226 note 4.

12 Mental Capacity Act 2005 Sch 1 para 15. If there is more than one donee, notice must be given to each of them: Sch 1 para 15. The form of notice is prescribed: see the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 17(2), Sch 5. Provision is also made for the use of Welsh language forms (reg 3(1)(a)); forms which differ in an immaterial respect in form or mode of expression from the specified form, forms to the same effect but with such variations as the circumstances may require or the court or Public Guardian may approve, and Welsh versions of such forms, are also acceptable (reg 3(1)(b)). Where it appears to the Public Guardian that there is good reason to do so, he must also provide (or arrange for the provision of) an explanation to the donor of such notice and its effect and why it is being brought to his attention: reg 17(3). Any information so provided must be provided to the donor personally and in a way that is appropriate to the donor's circumstances (for example using simple language, visual aids or other appropriate means): reg 17(4).

13 Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 17(1)(a).

14 As to the meaning of 'certified copy' see PARA 226 note 4.

15 Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 17(1)(b).

16 Mental Capacity Act 2005 s 58(1)(a). As to the duties of the Public Guardian see further **MENTAL HEALTH** vol 30(2) (Reissue) PARA 762. As to the administration of the register by the Public Guardian see the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, regs 30-32; and **MENTAL HEALTH**.

## UPDATE

### 231 Registering the instrument

NOTE 16--SI 2007/1253 reg 32 amended: SI 2009/1884.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/9. LASTING AND ENDURING POWERS OF ATTORNEY/(3) LASTING POWERS OF ATTORNEY/(iii) Activation and Operation of Power/232. Proof of registration.

### **232. Proof of registration.**

A document purporting to be an office copy of a registered instrument creating a lasting power of attorney<sup>1</sup> is evidence of the contents of the instrument and of the fact that it has been so registered<sup>2</sup>.

1 As to the meaning of 'lasting power of attorney' see PARA 217. As to applications for registration see PARA 225 et seq.

2 Mental Capacity Act 2005 Sch 1 para 16(1). This is without prejudice to the Powers of Attorney Act 1971 s 3 (proof by certified copies; see PARA 17): Mental Capacity Act 2005 Sch 1 para 16(2).

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/9. LASTING AND ENDURING POWERS OF ATTORNEY/(3) LASTING POWERS OF ATTORNEY/(iii) Activation and Operation of Power/233. Revocation of registered power by donor or court.

### **233. Revocation of registered power by donor or court.**

The donor may, at any time when he has capacity<sup>1</sup> to do so, revoke a registered instrument creating a lasting power of attorney<sup>2</sup>. The donor's bankruptcy<sup>3</sup> also revokes the instrument and power so far as it relates to his property<sup>4</sup> and affairs<sup>5</sup>, and the Public Guardian must cancel the registration of an instrument as a lasting power of attorney on being satisfied that the power has been so revoked<sup>6</sup>.

The court<sup>7</sup> may revoke a registered power, if the donor lacks capacity to do so<sup>8</sup>, if it is satisfied either:

- 153 (1) that fraud or undue pressure was used to induce the donor to execute an instrument for the purpose of creating a lasting power or to create a lasting power<sup>9</sup>;  
or
- 154 (2) that the donee<sup>10</sup> of a lasting power has behaved, or is behaving, in a way that contravenes his authority or is not in the donor's best interests or proposes to behave in such a way<sup>11</sup>,

and must direct the Public Guardian to cancel the registration of an instrument as a lasting power of attorney accordingly<sup>12</sup>.

The court may also determine any question relating to whether a power has been revoked or has otherwise come to an end<sup>13</sup>.

1 As to the meaning of 'capacity' and cognate expressions see PARA 195 note 2.

2 Mental Capacity Act 2005 s 13(1)(b), (2). As to the meaning of 'lasting power of attorney' see PARA 217. As to registration see PARA 225 et seq. References in these provisions to revoking the power include revoking the instrument: s 13(1).

A donor who revokes a lasting power of attorney must notify the Public Guardian that he has done so (Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 21(1)(a)) and notify the donee (or, if more than one, each of them) of the revocation (reg 21(1)(b)). The Public Guardian may also require the donor to provide such further information, or produce such documents, as he

reasonably considers necessary to enable him to determine whether the steps necessary for revocation have been taken: reg 21(3). Where the Public Guardian receives such a notice he must cancel the registration of the instrument creating the power if he is satisfied that the donor has taken such steps as are necessary in law to revoke it: reg 21(2). Where the Public Guardian cancels the registration of the instrument he must notify the donor and the donee (or, if more than one, each of them): reg 21(4).

As to the Public Guardian see the Mental Capacity Act 2005 ss 57-60; and **MENTAL HEALTH** vol 30(2) (Reissue) PARAS 761-763.

3 As to references in the Mental Capacity Act 2005 to the 'bankruptcy' of an individual see PARA 196 note 3.

4 As to the meaning of 'property' see PARA 195 note 11.

5 Mental Capacity Act 2005 s 13(3). If the donor is bankrupt merely because an interim bankruptcy restrictions order under the Insolvency Act 1986 (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY**) has effect in respect of him, the power is suspended, so far as it relates to the donor's property and affairs, for so long as the order has effect: Mental Capacity Act 2005 s 13(4).

If in the case of a registered instrument it appears to the Public Guardian that under s 13 a lasting power of attorney is revoked in relation to the donor's property and affairs (but not in relation to other matters), the Public Guardian must attach to the instrument a note to that effect: Sch 1 para 21. In any case where any of Sch 1 paras 21-24 (see PARAS 234-235) requires the Public Guardian to attach a note to an instrument registered as a lasting power of attorney (Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 18(1)), the Public Guardian must give a notice to the donor and the donee (or, if more than one, each of them) requiring him to deliver to the Public Guardian the original of instrument which was sent to the Public Guardian for registration, any office copy of that registered instrument and any certified copy of that registered instrument (reg 18(2)) and on receipt of the document the Public Guardian must attach the required note and return the document to the person from whom it was obtained (reg 18(3)). If the Public Guardian attaches a note to an instrument under the Mental Capacity Act 2005 Sch 1 paras 21-24 he must give notice of the note to the donee or donees of the power (or, as the case may be, to the other donee or donees of the power): Sch 1 para 25.

Where a person is required by or under the Mental Capacity Act 2005 to deliver up to the Public Guardian an instrument registered as a lasting power of attorney, an office copy of that registered instrument or a certified copy of that registered instrument, and the document has been lost or destroyed (Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 19(1)), the person required to deliver up the document must provide to the Public Guardian in writing either the date of the loss or destruction and the circumstances in which it occurred (if known) or a statement of when he last had the document in his possession (reg 19(2)).

6 Mental Capacity Act 2005 Sch 1 para 17(1)(a). If the Public Guardian cancels the registration of an instrument he must notify the donor and the donee or, if more than one, each of them: Sch 1 para 17(2). On the cancellation of the registration of an instrument, the instrument and any office copies of it must be delivered up to the Public Guardian to be cancelled: Sch 1 para 20. See note 5.

7 *Re the Court of Protection*: see PARA 198 note 6. For specific procedural provision in connection with the matters herein referred to see the Court of Protection Rules 2007, SI 2007/1744, r 67.

8 Mental Capacity Act 2005 s 22(1), (4)(b). If there is more than one donee, the court may under this provision revoke the instrument or the lasting power so far as it relates to any of them: s 22(5). 'Donee' includes an intended donee: s 22(6).

9 Mental Capacity Act 2005 s 22(3)(a).

10 Or, if more than one, any of them: Mental Capacity Act 2005 s 22(3)(b). See note 6.

11 Mental Capacity Act 2005 s 22(3)(b). As to intervention by the Public Guardian for the purpose of safeguarding the donor's best interests and monitoring the donee's behaviour see PARA 237.

12 Mental Capacity Act 2005 Sch 1 para 18(c).

13 See PARA 236.

## UPDATE

### 233 Revocation of registered power by donor or court

NOTE 5--SI 2007/1253 reg 18(2) amended: SI 2009/1884.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/9. LASTING AND ENDURING POWERS OF ATTORNEY/(3) LASTING POWERS OF ATTORNEY/(iii) Activation and Operation of Power/234. Termination of donee's appointment.

### **234. Termination of donee's appointment.**

The donee's appointment is terminated<sup>1</sup> if:

- 155 (1) he disclaims it<sup>2</sup>;
- 156 (2) he dies<sup>3</sup> or is bankrupt<sup>4</sup>;
- 157 (3) the donee is a trust corporation<sup>5</sup> and is wound up or dissolved<sup>6</sup>;
- 158 (4) a marriage or civil partnership between the donor and the donee is dissolved or annulled<sup>7</sup>; or
- 159 (5) the donee lacks capacity<sup>8</sup>.

The occurrence in relation to a donee of any of these events will also revoke the registered power<sup>9</sup> (unless the donee is replaced under the terms of the instrument<sup>10</sup> or he is one of two or more persons appointed to act as donees jointly and severally in respect of any matter and, after the event, there is at least one remaining donee<sup>11</sup>) and the Public Guardian must cancel the registration accordingly<sup>12</sup>. However:

- 160 (a) the donee's bankruptcy neither terminates his appointment nor revokes the registered power in so far as his authority relates to the donor's personal welfare<sup>13</sup>;
- 161 (b) where the donee is bankrupt merely because an interim bankruptcy restrictions order has effect in respect of him, his appointment and the registered power are suspended, so far as they relate to the donor's property and affairs, for so long as the order has effect<sup>14</sup>; and
- 162 (c) the dissolution or annulment of a marriage or civil partnership does not terminate the appointment of a donee, or revoke the registered power, if the instrument provided that it was not to do so<sup>15</sup>.

1 Mental Capacity Act 2005 s 13(5)(a).

2 Mental Capacity Act 2005 s 13(6)(a). The form which a donee must use to disclaim his appointment as donee has been prescribed (see the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 20(1), Sch 6): the donee must send the completed form to the donor and a copy of it to the Public Guardian and any other donee who, for the time being, is appointed under the power (reg 20(2)). Forms which differ in an immaterial respect in form or mode of expression from the specified form, forms to the same effect but with such variations as the circumstances may require or the court (ie the Court of Protection: see PARA 198 note 6) or Public Guardian may approve, and Welsh versions of such forms, are also acceptable: reg 3(1)(b). As to the Public Guardian see the Mental Capacity Act 2005 ss 57-60; and **MENTAL HEALTH** vol 30(2) (Reissue) PARAS 761-763.

3 The Public Guardian must cancel the registration of an instrument as a lasting power of attorney if he is satisfied that the power has been revoked as a result of the donor's death (Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 22(1)); where the Public Guardian cancels the registration of an instrument he must notify the donee or, if more than one, each of them (reg 22(2)).

4 Mental Capacity Act 2005 s 13(6)(b). As to references in the Mental Capacity Act 2005 to the 'bankruptcy' of an individual see PARA 196 note 3. In connection with the donee's bankruptcy see also s 13(8), (9); and the text and notes 13-14.

5 As to the meaning of 'trust corporation' see PARA 196 note 4.

6 Mental Capacity Act 2005 s 13(6)(b).

7 Mental Capacity Act 2005 s 13(6)(c).

8 Mental Capacity Act 2005 s 13(6)(d).

9 Mental Capacity Act 2005 s 13(5)(b).

10 Mental Capacity Act 2005 s 13(7)(a). If in the case of a registered instrument it appears to the Public Guardian that the donee has been replaced under the terms of the instrument the Public Guardian must attach to the instrument a note to that effect: Sch 1 para 23. See also note 11; and for procedural provisions relating to the attachment of notes see Sch 1 para 25; the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 18; and PARA 233 note 5.

11 Mental Capacity Act 2005 s 13(7)(b). If in the case of a registered instrument it appears to the Public Guardian that an event has occurred which has terminated the appointment of the donee but which has not revoked the instrument, the Public Guardian must attach to the instrument a note to that effect: Sch 1 para 22. See also note 10.

12 Mental Capacity Act 2005 Sch 1 para 17(1)(b). If the Public Guardian cancels the registration of an instrument he must notify the donor and the donee or, if more than one, each of them: Sch 1 para 17(2). On the cancellation of the registration of an instrument, the instrument and any office copies of it must be delivered up to the Public Guardian to be cancelled: Sch 1 para 20. As to the delivery up of documents see PARA 233 note 5.

13 Mental Capacity Act 2005 s 13(8).

14 Mental Capacity Act 2005 s 13(9). Where the donee is one of two or more appointed to act jointly and severally under the registered power in respect of any matter, the reference in s 13(9) to the suspension of the power is to its suspension in so far as it relates to that donee: s 13(10). If in the case of a registered instrument it appears to the Public Guardian that under s 13 a lasting power of attorney is suspended in relation to the donor's property and affairs (but not in relation to other matters), the Public Guardian must attach to the instrument a note to that effect: Sch 1 para 21. For procedural provisions relating to such notes see Sch 1 para 25; the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 18; and PARA 233 note 5.

15 Mental Capacity Act 2005 s 13(11).

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/9. LASTING AND ENDURING POWERS OF ATTORNEY/(3) LASTING POWERS OF ATTORNEY/(iv) Administration of Power and Protection of Parties/235. Interpretation and administration of lasting power.

#### **(iv) Administration of Power and Protection of Parties**

##### **235. Interpretation and administration of lasting power.**

Where a person has executed or purported to execute an instrument with a view to creating a lasting power of attorney<sup>1</sup>, or an instrument has been registered as a lasting power of attorney<sup>2</sup> conferred by that person<sup>3</sup>, the court<sup>4</sup> may determine any question as to the meaning or effect of the power or an instrument purporting to create one<sup>5</sup>, and if the court determines that a lasting power contains a provision which is ineffective as part of a lasting power or prevents the instrument from operating as a valid lasting power it must either notify the Public Guardian<sup>6</sup> that it has severed the provision<sup>7</sup> or direct him to cancel the registration of the instrument as a lasting power<sup>8</sup>.

The court may also give directions with respect to decisions which the donee<sup>9</sup> has authority to make and the donor lacks capacity<sup>10</sup> to make<sup>11</sup> and give any consent or authorisation to act which the donee would have to obtain from the donor if the donor had capacity to give it<sup>12</sup>. Moreover the court may, if the donor lacks capacity to do so:

- 163 (1) give directions to the donee with respect to the rendering by him of reports or accounts and the production of records kept by him for that purpose<sup>13</sup>;
- 164 (2) require the donee to supply information or produce documents or things in his possession as donee<sup>14</sup>;
- 165 (3) give directions with respect to the remuneration or expenses of the donee<sup>15</sup>;
- 166 (4) relieve the donee wholly or partly from any liability which he has or may have incurred on account of a breach of his duties as donee<sup>16</sup>.

The court may authorise the making of gifts which are not permitted gifts<sup>17</sup>.

1 Mental Capacity Act 2005 s 22(1)(a). As to the meaning of 'lasting power of attorney' see PARA 217. As to execution see PARA 222.

2 As to registration see PARA 225 et seq.

3 Mental Capacity Act 2005 s 22(1)(b).

4 I.e. the Court of Protection: see PARA 198 note 6. For specific procedural provision in connection with the matters herein referred to see the Court of Protection Rules 2007, SI 2007/1744, r 67.

5 Mental Capacity Act 2005 s 23(1).

6 As to the Public Guardian see the Mental Capacity Act 2005 ss 57-60; and **MENTAL HEALTH** vol 30(2) (Reissue) PARAS 761-763.

7 Mental Capacity Act 2005 Sch 1 para 19(1), (2)(a). If in the case of a registered instrument the court notifies the Public Guardian under Sch 1 para 19(2)(a) that it has severed a provision of the instrument, the Public Guardian must attach to it a note to that effect: Sch 1 para 24. For procedural provisions relating to the attachment of notes see Sch 1 para 25; the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 18; and PARA 233 note 5.

8 Mental Capacity Act 2005 Sch 1 para 19(2)(b). If the Public Guardian cancels the registration of an instrument he must notify the donor and the donee or, if more than one, each of them: Sch 1 para 17(2). On the cancellation of the registration of an instrument, the instrument and any office copies of it must be delivered up to the Public Guardian to be cancelled: Sch 1 para 20. As to the delivery up of documents see PARA 233 note 5.

9 Where two or more donees are appointed under a lasting power of attorney, these provisions apply as if references to the donee were to all or any of them: Mental Capacity Act 2005 s 23(5).

10 As to the meaning of 'capacity' and cognate expressions see PARA 195 note 2.

11 Mental Capacity Act 2005 s 23(2)(a).

12 Mental Capacity Act 2005 s 23(2)(b).

13 Mental Capacity Act 2005 s 23(3)(a).

14 Mental Capacity Act 2005 s 23(3)(b).

15 Mental Capacity Act 2005 s 23(3)(c).

16 Mental Capacity Act 2005 s 23(3)(d).

17 Mental Capacity Act 2005 s 23(4). Gifts which are not permitted gifts are gifts that are not within s 12(2) (see PARA 217).



### 236. Power to cancel lasting power.

Where a person has executed or purported to execute an instrument with a view to creating a lasting power of attorney<sup>1</sup>, or an instrument has been registered as a lasting power of attorney<sup>2</sup> conferred by that person<sup>3</sup>, the court<sup>4</sup> may:

- 167 (1) determine any question relating to whether one or more of the requirements for the creation of a lasting power of attorney have been met<sup>5</sup>; and
- 168 (2) determine any question relating to whether the power has been revoked or has otherwise come to an end<sup>6</sup>,

and must direct the Public Guardian<sup>7</sup> to cancel the registration of an instrument as a lasting power of attorney if it determines<sup>8</sup> either that a requirement for creating the power was not met<sup>9</sup> or that the power has been revoked or has otherwise come to an end<sup>10</sup>. The court may also intervene in the process of creating, executing or registering a lasting power where it is appropriate to do so in the interests of the donor<sup>11</sup>.

1 Mental Capacity Act 2005 s 22(1)(a). As to the meaning of 'lasting power of attorney' see PARA 217. As to execution see PARA 222.

2 As to registration see PARA 225 et seq.

3 Mental Capacity Act 2005 s 22(1)(b).

4 I.e. the Court of Protection: see PARA 198 note 6. For specific procedural provision in connection with the matters herein referred to see the Court of Protection Rules 2007, SI 2007/1744, r 67.

5 Mental Capacity Act 2005 s 22(2)(a). As to the requirements for the creation of a lasting power of attorney see PARA 219 et seq.

6 Mental Capacity Act 2005 s 22(2)(b). As to revocation and termination see PARAS 223-224 (pre-registration revocation and termination) and PARAS 233-234 (revocation and termination of registered power).

7 As to the Public Guardian see the Mental Capacity Act 2005 ss 57-60; and **MENTAL HEALTH** vol 30(2) (Reissue) PARAS 761-763.

8 I.e. under either the Mental Capacity Act 2005 s 22(2)(a) or s 22(2)(b) (see the text and notes 5, 6).

9 Mental Capacity Act 2005 Sch 1 para 18(a).

10 Mental Capacity Act 2005 Sch 1 para 18(b). If the Public Guardian cancels the registration of an instrument he must notify the donor and the donee or, if more than one, each of them: Sch 1 para 17(2). On the cancellation of the registration of an instrument, the instrument and any office copies of it must be delivered up to the Public Guardian to be cancelled: Sch 1 para 20. As to the delivery up of documents see PARA 233 note 5.

11 I.e. where fraud or undue pressure is being used to induce the donor to execute an instrument for the purpose of creating a lasting power or to create a lasting power or where the donee has behaved, or is behaving, in a way that contravenes his authority or is not in the donor's best interests or proposes to behave in such a way: see the Mental Capacity Act 2005 s 22(3)-(6), Sch 1 para 18(c); and PARAS 223, 230, 233. As to intervention by the Public Guardian for the purpose of safeguarding the donor's best interests and monitoring the donee's behaviour see PARA 237.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/9. LASTING AND ENDURING POWERS OF ATTORNEY/(3) LASTING POWERS OF ATTORNEY/(iv) Administration of Power and Protection of Parties/237. Intervention by Public Guardian.

### 237. Intervention by Public Guardian.

Where it appears to the Public Guardian<sup>1</sup> that there are circumstances suggesting that the donee of a lasting power of attorney<sup>2</sup> may:

- 169 (1) have behaved, or may be behaving, in a way that contravenes his authority or is not in the best interests of the donor of the power<sup>3</sup>;
- 170 (2) be proposing to behave in a way that would contravene that authority or would not be in the donor's best interests<sup>4</sup>; or
- 171 (3) have failed to comply with the requirements of an order made, or directions given, by the court<sup>5</sup>,

the Public Guardian may require the donee:

- 172 (a) to provide specified information or information of a specified description<sup>6</sup>; or
- 173 (b) to produce specified documents or documents of a specified description<sup>7</sup>,

and may require any information so provided to be verified, and any document so produced to be authenticated, in such manner as he may reasonably require<sup>8</sup>.

1 As to the Public Guardian see the Mental Capacity Act 2005 ss 57-60; and **MENTAL HEALTH** vol 30(2) (Reissue) PARAS 761-763.

2 As to the meaning of 'lasting power of attorney' see PARA 217.

3 Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 46(1)(a).

4 Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 46(1)(b).

5 Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 46(1)(c). The court is the Court of Protection: see PARA 198 note 6.

6 Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 46(2)(a). 'Specified' means specified in a notice in writing given to the donee by the Public Guardian: reg 46(5). The information or documents must be provided or produced before the end of such reasonable period as may be specified (reg 46(3)(a)) and at such place as may be specified (reg 46(3)(b)).

7 Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 46(2)(b). See note 6.

8 Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, reg 46(4).

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/9. LASTING AND ENDURING POWERS OF ATTORNEY/(3) LASTING POWERS OF ATTORNEY/(iv) Administration of Power and Protection of Parties/238. Acts done in pursuance of invalid power.

### **238. Acts done in pursuance of invalid power.**

If an instrument has been registered<sup>1</sup> as a lasting power of attorney<sup>2</sup> but a lasting power of attorney was not created<sup>3</sup> a donee<sup>4</sup> who acts in purported exercise of the power does not incur any liability<sup>5</sup> because of the non-existence of the power<sup>6</sup> and any transaction between the donee and another person is, in favour of that person, as valid as if the power had been in existence<sup>7</sup>. This applies whether or not the registration has been cancelled at the time of the act or transaction in question<sup>8</sup>, unless at the time of acting the donee knows that a lasting

power was not created<sup>9</sup> or is aware of circumstances which, if a lasting power had been created, would have terminated his authority to act as a donee<sup>10</sup> or at the time of the transaction the other person has knowledge of any such matter<sup>11</sup>.

1    le under the Mental Capacity Act 2005 Sch 1 (see PARA 225 et seq).

2    Mental Capacity Act 2005 s 14(1)(a). As to the meaning of 'lasting power of attorney' see PARA 217.

3    Mental Capacity Act 2005 s 14(1)(b).

4    Where two or more donees are appointed under a lasting power of attorney, these provisions apply as if references to the donee were to all or any of them: Mental Capacity Act 2005 s 14(6).

5    le to the donor or any other person: Mental Capacity Act 2005 s 14(2).

6    Mental Capacity Act 2005 s 14(2).

7    Mental Capacity Act 2005 s 14(3).

8    Mental Capacity Act 2005 s 14(1).

9    Mental Capacity Act 2005 s 14(2)(a).

10    Mental Capacity Act 2005 s 14(2)(b).

11    Mental Capacity Act 2005 s 14(3). Where the interest of a purchaser depends on whether a transaction between the donee and another person was valid by virtue of s 14(3), it is conclusively presumed in favour of the purchaser that the transaction was valid if the transaction between that person and the donee was completed within 12 months of the date on which the instrument was registered (s 14(4)(a)) and that person makes a statutory declaration, before or within three months after the completion of the purchase, that he had no reason at the time of the transaction to doubt that the donee had authority to dispose of the property which was the subject of the transaction (s 14(4)(b)). As to the meanings of 'purchaser' and 'purchase' see the Law of Property Act 1925 s 205(1); and **SALE OF LAND** vol 42 (Reissue) PARA 55; definition applied by the Mental Capacity Act 2005 s 64(1). As to the meaning of 'property' see PARA 195 note 11.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/10. ESTATE AGENCIES AND ACCOMMODATION AGENCIES/(1) ESTATE AGENCIES/(i) Scope of Regulation/239. Introduction.

## **10. ESTATE AGENCIES AND ACCOMMODATION AGENCIES**

### **(1) ESTATE AGENCIES**

#### **(i) Scope of Regulation**

##### **239. Introduction.**

Certain controls have been imposed<sup>1</sup> in respect of persons engaged in estate agency work<sup>2</sup>. The following paragraphs<sup>3</sup> outline the extent of these controls, which relate to standards of competence<sup>4</sup>, dealings with clients and third parties<sup>5</sup>, and clients' money<sup>6</sup> and the powers given to the Office of Fair Trading to prohibit unfit persons from engaging in estate agency work<sup>7</sup>.

1    le under the Estate Agents Act 1979. As to the enforcement of the Act see PARAS 278-281.

2    As to what does and does not amount to 'estate agency work' see PARA 240.

3    le PARAS 240-281.

4 See the Estate Agents Act 1979 ss 22, 23; and PARAS 243-244.

5 See PARA 245 et seq. As to the prohibition on making a false or misleading statement about property matters in the course of an estate agency or property development business, see generally the Property Misdescriptions Act 1991; and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARAS 791-800.

6 See the Estate Agents Act 1979 ss 12-21; and PARA 251 et seq.

7 See the Estate Agents Act 1979 ss 3, 4; and PARAS 267, 273. As to the role of the Office of Fair Trading in regulating estate agents see PARA 278.

## UPDATE

### 239-282 Estate Agencies

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

### 239 Introduction

TEXT AND NOTES--See Provision of Services Regulations 2009, SI 2009/2999; and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 385A.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/10. ESTATE AGENCIES AND ACCOMMODATION AGENCIES/(1) ESTATE AGENCIES/(i) Scope of Regulation/240. Estate agency work.

### 240. Estate agency work.

For the purpose of the statutory regulation of estate agents<sup>1</sup>, 'estate agency work' is defined as things done by any person in the course of a business<sup>2</sup> pursuant to instructions received from another person (the 'client') who wishes to dispose of or acquire an interest in land<sup>3</sup>:

- 174 (1) for the purpose of, or with a view to, effecting the introduction to the client of a third person who wishes to acquire or, as the case may be, dispose of such an interest<sup>4</sup>; and
- 175 (2) after such an introduction has been effected in the course of that business, for the purpose of securing the disposal or, as the case may be, the acquisition of that interest<sup>5</sup>.

Things done in a professional capacity by associated persons, and things which are incidental to estate agency work, are not regulated under these provisions<sup>6</sup>.

1 ie for the purposes of the Estate Agents Act 1979 (see PARA 241 et seq).

2 le including a business in which the person in question is employed: Estate Agents Act 1979 s 1(1). Any reference in s 1 to 'employment' is a reference to employment under a contract of employment: s 1(5)(c). As to contracts of employment see **EMPLOYMENT** vol 39 (2009) PARA 1 et seq.

3 Any reference in the Estate Agents Act 1979 to 'disposing' of an interest in land is a reference to transferring a legal estate in fee simple absolute in possession or transferring or creating (elsewhere than in Scotland) a lease which, by reason of the level of the rent, the length of the term or both, has a capital value which may be lawfully realised on the open market, and any reference to acquiring an interest in land must be construed accordingly: s 2(1)(a), (b). 'Lease' includes the rights and obligations arising under an agreement to grant a lease: s 2(2). However, references to 'disposing' of an interest in land do not extend to disposing of the interest of a creditor whose debt is secured by way of a mortgage or charge of any kind over land or an agreement for any such mortgage or charge: s 2(3)(a).

4 Estate Agents Act 1979 s 1(1)(a); Estate Agents (Provision of Information) Regulations 1991, SI 1991/859, reg 1(2); Estate Agents (Undesirable Practices) (No 2) Order 1991, SI 1991/1032, art 1(2).

5 Estate Agents Act 1979 s 1(1)(b).

6 See the Estate Agents Act 1979 s 1(2)-(5); and PARA 241.

## UPDATE

### 239-282 Estate Agencies

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/10. ESTATE AGENCIES AND ACCOMMODATION AGENCIES/(1) ESTATE AGENCIES/(i) Scope of Regulation/241. Excluded activities.

#### 241. Excluded activities.

The statutory regulation of estate agents<sup>1</sup> does not apply to things done:

- 176 (1) in the course of his profession by a practising solicitor<sup>2</sup> or a person employed<sup>3</sup> by him<sup>4</sup>;
- 177 (2) in the course of credit brokerage<sup>5</sup>;
- 178 (3) in the course of carrying out any survey or valuation pursuant to a contract which is distinct from that under which estate agency work<sup>6</sup> is done<sup>7</sup>;
- 179 (4) in connection with specified planning matters<sup>8</sup>,

or to things done by any person:

- 180 (a) pursuant to instructions received by him in the course of his employment in relation to an interest in land if his employer is the person who, on his own behalf, wishes to dispose of or acquire that interest<sup>9</sup>;
- 181 (b) in relation to any interest in any property if the property is subject to a mortgage<sup>10</sup> and he is the receiver of the income of it<sup>11</sup>; or

182 (c) in relation to a present, prospective or former employee of his or of any person by whom he also is employed if the things are done by reason of the employment (whether past, present or future)<sup>12</sup>.

The statutory regulation of estate agents<sup>13</sup> also does not apply to the publication of advertisements or the dissemination of information by a person who does no other acts which amount to estate agency work<sup>14</sup>.

1 In the Estate Agents Act 1979 (see PARA 242 et seq). As to the matters to which the legislation does apply see PARA 240.

2 'Practising solicitor' means a solicitor who is qualified to act as such under the Solicitors Act 1974 s 1 (see **LEGAL PROFESSIONS** vol 65 (2008) PARA 635) or corresponding Northern Irish legislation: Estate Agents Act 1979 s 1(5)(a).

3 As to 'employment' see PARA 240 note 2.

4 Estate Agents Act 1979 s 1(2)(a).

5 Estate Agents Act 1979 s 1(2)(b). 'Credit brokerage' means credit brokerage within the meaning of the Consumer Credit Act 1974 (see s 145(2)-(4); and **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 272); Estate Agents Act 1979 s 1(2)(b).

6 In the things falling within the Estate Agents Act 1979 s 1(1) (see PARA 240).

7 Estate Agents Act 1979 s 1(2)(d).

8 Estate Agents Act 1979 s 1(2)(e) (amended by the Planning (Consequential Provisions) Act 1990 s 4, Sch 2 para 42). The 'specified planning matters' are things done in connection with applications and other matters arising under the Town and Country Planning Act 1990, the Planning (Listed Buildings and Conservation Areas) Act 1990, the Planning (Hazardous Substances) Act 1990 or corresponding Scottish and Northern Irish legislation: Estate Agents Act 1979 s 1(2)(e) (as so amended).

9 Estate Agents Act 1979 s 1(3)(a). As to 'acquiring' and 'disposing of' an interest in land see PARA 240 note 3.

10 'Mortgage' includes a debenture and any other charge on property for securing money or money's worth: Estate Agents Act 1979 s 1(5)(b).

11 Estate Agents Act 1979 s 1(3)(b).

12 Estate Agents Act 1979 s 1(3)(c).

13 See note 1.

14 Estate Agents Act 1979 s 1(4). As to what amounts to 'estate agency work' see PARA 240.

## UPDATE

### 239-282 Estate Agencies

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/10. ESTATE AGENCIES AND ACCOMMODATION AGENCIES/(1) ESTATE AGENCIES/(i) Scope of Regulation/242. Business relationships.

## **242. Business relationships.**

For the purposes of the statutory regulation of estate agents<sup>1</sup> a person is an 'associate' of another if he is the spouse<sup>2</sup> or civil partner<sup>3</sup> or a relative<sup>4</sup> of that other<sup>5</sup>. A body corporate can be an 'associate' of another body corporate<sup>6</sup>, an unincorporated association can be an 'associate' of another unincorporated association<sup>7</sup> and a partnership can be an 'associate' of another partnership<sup>8</sup>.

'Associate' also encompasses a business associate<sup>9</sup> and a spouse, civil partner or a relative thereof<sup>10</sup>. Every director and controller<sup>11</sup> of a body corporate is a 'business associate' of that body as respects acts done in the course of a business carried on by it<sup>12</sup>. Members of partnerships are 'business associates' of the other partners and of the partnership itself<sup>13</sup>, and officers of unincorporated associations are 'business associates' of their fellow officers<sup>14</sup>.

Where an offence committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, he as well as the body corporate is guilty of that offence and liable to be proceeded against and punished accordingly<sup>15</sup>.

<sup>1</sup> ie the Estate Agents Act 1979 (see PARA 243 et seq).

<sup>2</sup> For this purpose references to a 'spouse' include a former spouse and a reputed spouse: Estate Agents Act 1979 s 32(3) (s 32(2), (3) amended by the Civil Partnership Act 2004 s 261(1), (4), Sch 27 para 63, Sch 30).

<sup>3</sup> For this purpose references to a 'civil partner' include a former civil partner and a reputed civil partner: Estate Agents Act 1979 s 32(3) (as amended (see note 2); further amended by the Civil Partnership Act 2004 (Overseas Relationships and Consequential, etc Amendments) Order 2005, SI 2005/3129, art 1).

<sup>4</sup> For this purpose 'relative' means brother, sister, uncle, aunt, nephew, niece, lineal ancestor or lineal descendant: Estate Agents Act 1979 s 32(3) (as amended: see note 2). A relationship is established as if an illegitimate child or stepchild of a person were the legitimate child of the relationship in question: s 32(3) (as so amended).

<sup>5</sup> Estate Agents Act 1979 s 32(2) (as amended: see note 2); Estate Agents (Provision of Information) Regulations 1991, SI 1991/859, reg 1(2).

<sup>6</sup> A body corporate is an associate of another body corporate if the same person is a controller of both, or a person is a controller of one and persons who are his associates, or he and persons who are his associates, are controllers of the other (Estate Agents Act 1979 s 32(4)(a)) or if a group of two or more persons is a controller of each company, and the groups either consist of the same persons or could be regarded as consisting of the same persons by treating (in one or more cases) a member of either group as replaced by a person of whom he is an associate (s 32(4)(b)).

<sup>7</sup> An unincorporated association is an associate of another unincorporated association if any person is an officer of both associations (Estate Agents Act 1979 s 32(5)(a)), has the management or control of the activities of both associations (s 32(5)(b)) or is an officer of one association and has the management or control of the activities of the other association (s 32(5)(c)).

<sup>8</sup> A partnership is an associate of another partnership if any person is a member of both partnerships (Estate Agents Act 1979 s 32(6)(a)), a person who is a member of one partnership is an associate of a member of the other partnership (s 32(6)(b)) or a member of one partnership has an associate who is also an associate of a member of the other partnership (s 32(6)(c)).

<sup>9</sup> Estate Agents Act 1979 s 32(1); Estate Agents (Undesirable Practices) (No 2) Order 1991, SI 1991/1032, art 1(2).

<sup>10</sup> Estate Agents Act 1979 s 32(2) (as amended: see note 2).

11 In relation to a body corporate 'controller' means a person in accordance with whose directions or instructions the directors of the body or of any other body corporate which is its controller (or any of them) are accustomed to act (Estate Agents Act 1979 s 31(5)(a)) or a person who, either alone or with any associate or associates, is entitled to exercise, or control the exercise of, one third or more of the voting power at any general meeting of the body corporate or of another body corporate which is its controller (s 31(5)(b)).

12 Estate Agents Act 1979 s 31(1), (2).

13 As respects acts done in the course of a business carried on by a partnership, each partner is a business associate of every other member of the partnership and also of the partnership itself and, in the case of a partner which is a body corporate, every person who is a business associate of that body (ie by virtue of the Estate Agents Act 1979 s 31(2) (see the text and note 12)) is also a business associate of every other member of the partnership: s 31(3).

14 As respects acts done in the course of a business carried on by an unincorporated association, every officer of the association and any other person who has the management or control of its activities is a business associate of that association: s 31(4).

15 Estate Agents Act 1979 s 28(2).

## UPDATE

### 239-282 Estate Agencies

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/10. ESTATE AGENCIES AND ACCOMMODATION AGENCIES/(1) ESTATE AGENCIES/(ii) Competence to Act as Estate Agent/243. Standards of competence.

## (ii) Competence to Act as Estate Agent

### 243. Standards of competence.

As from a day to be appointed<sup>1</sup> the Secretary of State may by regulations<sup>2</sup> make provision to ensure that estate agents<sup>3</sup> satisfy minimum standards of competence<sup>4</sup>. Such regulations must prescribe a degree of practical experience which is to be taken as evidence of competence and may make provision for professional or academic qualifications<sup>5</sup>, and after the appointed day persons may not engage in estate agency work without having attained the required standard<sup>6</sup>: any who do will commit an offence<sup>7</sup>.

1 At the date at which this volume states the law the Estate Agents Act 1979 s 22 (see the text and notes 2-7) had not been brought into force.

2 A draft of such regulations must be laid before Parliament and approved by a resolution of each House: Estate Agents Act 1979 s 22(5) (not yet in force).

Before making any order or regulations under s 3(1)(a)(iii), (d), 14-16, 18, 19, 22 the Secretary of State must consult the Office of Fair Trading, such bodies representative of persons carrying on estate agency work, such bodies representative of consumers and such other persons as he thinks fit (s 30(1), (2) (s 30(1) amended by



the Enterprise Act 2002 s 278(1), Sch 25 para 9(1), (14)(b))). As to the Office of Fair Trading see PARA 278. As from a day to be appointed these requirements also apply in respect of regulations under the Estate Agents Act 1979 s 21A (see PARA 250) (s 30(2) (prospectively amended by the Consumers, Estate Agents and Redress Act 2007 Sch 7 para 3). At the date at which this volume states the law no such day had been appointed. Any power of the Secretary of State to make orders or regulations under the Estate Agents Act 1979 may be so exercised as to make different provision in relation to different cases or classes of cases and to exclude certain cases or classes of cases and includes power to make such supplemental, incidental and transitional provisions as he thinks fit: s 30(3). As to the meaning of 'estate agency work' see PARA 240; for activities not amounting to 'estate agency work' for these purposes see PARA 241.

3 le persons engaging in estate agency work as defined in the Estate Agents Act 1979 s 1(1) (see PARA 240).

4 Estate Agents Act 1979 s 22(1) (not yet in force). References in s 22 to a person who has attained the required standard of competence are references to a person who has that degree of practical experience which, in accordance with the regulations (see note 5), is to be taken as evidence of competence or, where the regulations so provide, holds such qualifications or otherwise fulfils such conditions as, in accordance with the regulations, are to be taken to be evidence of competence: s 22(2) (not yet in force).

5 See Estate Agents Act 1979 s 22(2) (not yet in force), which provides that if the Secretary of State exercises his power to make regulations under s 2(1) he must in those regulations prescribe a degree of practical experience which is to be taken as evidence of competence. Without prejudice to the generality of this requirement, the regulations may also:

- 36 (1) prescribe professional or academic qualifications which are also to be taken to be evidence of competence (s 22(2)(a) (not yet in force));
- 37 (2) designate any body of persons as a body which may itself specify professional qualifications the holding of which is to be taken as evidence of competence (s 22(2)(b) (not yet in force));
- 38 (3) make provision for and in connection with the establishment of a body having power to examine and inquire into the competence of persons engaged or professing to engage in estate agency work (s 22(2)(c) (not yet in force)); and
- 39 (4) delegate to a body established as mentioned above powers of the Secretary of State with respect of the matters referred to under head (1) above (s 22(2)(d) (not yet in force)).

At the date at which this volume states the law no such regulations had been made.

6 See the Estate Agents Act 1979 s 22(3) (not yet in force), which provides that after the day appointed for the coming into force of s 22 no individual may engage in estate agency work on his own account unless he has attained the required standard of competence, no member of a partnership may engage in estate agency work on the partnership's behalf unless a prescribed number of the partners have attained the required standard of competence, and no body corporate or unincorporated association may engage in estate agency work unless a prescribed number and prescribed description of the officers, members or employees of the body have attained the required standard of competence. The prescribed number of partners for these purposes, and the prescribed number and description of officers, members or employees of a corporate body or unincorporated association, are to be specified by order of the Secretary of State (s 22(4) (not yet in force)). At the date at which this volume states the law no such order had been made. 'Unincorporated association' does not include a partnership: s 33(1). Any such order will be made by statutory instrument, which is subject to annulment in pursuance of a resolution of either House of Parliament: s 22(4) (not yet in force).

7 Estate Agents Act 1979 s 22(3) (not yet in force). Any person who contravenes s 22(3) is liable on conviction on indictment or on summary conviction to a fine which, on summary conviction, may not exceed the statutory maximum: s 22(3) (not yet in force). As to the statutory maximum see PARA 203 note 3.

In any proceedings for an offence under the Estate Agents Act 1979 it is a defence for the person charged to prove that he took all reasonable precautions and exercised all due diligence to avoid the commission of an offence by himself or any person under his control: s 28(1).

## UPDATE

### 239-282 Estate Agencies

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements

mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/10. ESTATE AGENCIES AND ACCOMMODATION AGENCIES/(1) ESTATE AGENCIES/(ii) Competence to Act as Estate Agent/244. Bankrupts.

#### **244. Bankrupts.**

Persons adjudged bankrupt may not engage in any form of estate agency work<sup>1</sup> except as employees of another<sup>2</sup>, and any person who engages in estate agency work in contravention of this restriction commits an offence<sup>3</sup>.

This prohibition ceases to have effect when the adjudication of bankruptcy is annulled, or the person in question is discharged from bankruptcy<sup>4</sup>.

1 As to the meaning of 'estate agency work' see PARA 240; for activities not amounting to 'estate agency work' for these purposes see PARA 241.

2 Estate Agents Act 1979 s 23(1). 'Employment' in this context does not include employment by a body corporate of which the person concerned is a director or controller: s 23(3). As to the meaning of 'controller' see PARA 242 note 11.

3 Estate Agents Act 1979 s 23(4). A person who commits this offence is liable on conviction on indictment or on summary conviction to a fine which, on summary conviction, is not to exceed the statutory maximum: s 23(4). As to offences by bodies corporate see PARA 242. As to defences see PARA 243 note 7. As to the statutory maximum see PARA 203 note 3.

4 Estate Agents Act 1979 s 23(2) (amended by the Insolvency Act 1985 s 235, Sch 8 para 33; and the Insolvency Act 1986 s 437, Sch 11). As to annulment and discharge see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARAS 610-646.

### **UPDATE**

#### **239-282 Estate Agencies**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/10. ESTATE AGENCIES AND ACCOMMODATION AGENCIES/(1) ESTATE AGENCIES/(iii) Dealing with Clients and Clients' Money/A. RELATIONSHIP WITH CLIENTS GENERALLY/245. Provision of information as to services.

#### **(iii) Dealing with Clients and Clients' Money**

## **A. RELATIONSHIP WITH CLIENTS GENERALLY**

### **245. Provision of information as to services.**

Prior to entering into a contract to undertake estate agency work<sup>1</sup> for a client<sup>2</sup> an estate agent<sup>3</sup> must provide the client with information regarding the services<sup>4</sup> being offered, that is information as to the services:

- 183 (1) which the agent is himself offering, or intends to offer, to any prospective purchaser of an interest in the land<sup>5</sup>; or
- 184 (2) which he knows a connected person<sup>6</sup> or (in a case where he or a connected person would derive a financial benefit from the provision of the service) another person is offering, or intends to offer, to any prospective purchaser of an interest in the land<sup>7</sup>.

The agent is required to give this information, and the information he is required to give as to remuneration<sup>8</sup>, at the time when communication commences between the agent and the client or as soon as is reasonably practicable thereafter provided it is a time before the client is committed to any liability towards the agent<sup>9</sup>. All such information must be given in writing<sup>10</sup>.

Failure to comply with any of these provisions renders the agency contract unenforceable<sup>11</sup> other than by order of the court<sup>12</sup>.

1 As to the meaning of 'estate agency work' see PARA 240; for activities not amounting to 'estate agency work' for these purposes see PARA 241.

2 For the purposes of the Estate Agents (Provision of Information) Regulations 1991, SI 1991/859, 'client' means a person on whose behalf an estate agent acts: reg 1(2).

3 For the purposes of the Estate Agents (Provision of Information) Regulations 1991, SI 1991/859, 'estate agent' means any person who in the course of a business (including one in which he is employed) engages in estate agency work and includes cases where he is negotiating on his own behalf: reg 1(2).

4 'Services' means any services to a prospective purchaser for consideration, being services which are such as would ordinarily be made available to a prospective purchaser in connection with his acquisition of an interest in land or his use or enjoyment of it (including the provision to that purchaser of banking and insurance services and financial assistance and securing the disposal for that purchaser of an interest in land if that disposal is one which has to be made in order for him to be able to make the acquisition he is proposing or is one which is a result of that acquisition); 'purchaser' means a person to whom an interest in land is transferred or in whose favour it is created; 'interest in land' means any of the interests referred to in the Estate Agents Act 1979 s 2 (see PARA 240); references in the Estate Agents (Provision of Information) Regulations 1991, SI 1991/859, to an 'interest in the land' are references to the particular interest in land of which the estate agent is engaged to secure the disposal or acquisition; and 'financial benefit' includes commission and any performance related benefit: reg 1(2).

5 Estate Agents Act 1979 s 18(1)(b), (4)(a); Estate Agents (Provision of Information) Regulations 1991, SI 1991/859, reg 2(1)(a). As to the making of regulations generally see PARA 243 note 2. Regulations under the Estate Agents Act 1979 s 18(4) must be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: s 18(4).

6 In relation to an estate agent 'connected person' means his employer or principal, any employee or agent of his or any associate of his or of any such person: Estate Agents (Provision of Information) Regulations 1991, SI 1991/859, reg 1(2). As to the meaning of 'associate' see PARA 242.

7 Estate Agents (Provision of Information) Regulations 1991, SI 1991/859, reg 2(1)(b).

8 I.e the information specified for the purposes of the Estate Agents Act 1979 s 18(2) (see PARA 246).

9 Estate Agents Act 1979 s 18(4)(b); Estate Agents (Provision of Information) Regulations 1991, SI 1991/859, regs 2(2), 3(1).

10 Estate Agents (Provision of Information) Regulations 1991, SI 1991/859, reg 4.

11 References to the enforcement of a contract or variation include the withholding of money in pursuance of a lien for money alleged to be due under the contract or as a result of the variation: Estate Agents Act 1979 s 18(7)(a).

12 See the Estate Agents Act 1979 s 18(5), which provides that if any person either fails to comply with the obligation under s 18(1) with respect to a contract or with any provision of the Estate Agents (Provision of Information) Regulations 1991, SI 1991/859, relating to that obligation (see the text and notes 1-10; and PARA 246) or fails to comply with the obligation under the Estate Agents Act 1979 s 18(3) with respect to any variation of a contract or with any provision of the Estate Agents (Provision of Information) Regulations 1991, SI 1991/859, relating to that obligation (see PARA 247) the contract or, as the case may be, the variation of it is not enforceable by him except pursuant to an order of the court. If in such a case the agent concerned makes an application to the court (ie any court having jurisdiction to hear and determine matters arising out of the contract) for the enforcement of the contract or, as the case may be, of a contract as varied by the variation, the court must dismiss the application if, but only if, it considers it just to do so having regard to prejudice caused to the client by the agent's failure to comply with his obligation and the degree of culpability for the failure; and where the court does not dismiss the application, it may nevertheless order that any sum payable by the client under the contract or, as the case may be, under the contract as varied is to be reduced or discharged so as to compensate the client for prejudice suffered as a result of the agent's failure to comply with his obligation (s 18(6), (7)(b)).

## UPDATE

### 239-282 Estate Agencies

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/10. ESTATE AGENCIES AND ACCOMMODATION AGENCIES/(1) ESTATE AGENCIES/(iii) Dealing with Clients and Clients' Money/A. RELATIONSHIP WITH CLIENTS GENERALLY/246. Provision of information as to remuneration.

#### 246. Provision of information as to remuneration.

Prior to entering into a contract to undertake estate agency work<sup>1</sup> for a client<sup>2</sup> an estate agent<sup>3</sup> must provide the client with information regarding remuneration for the work<sup>4</sup>, including:

185 (1) particulars of the circumstances in which the client will become liable to pay remuneration to the agent for carrying out estate agency work<sup>5</sup>;

186 (2) particulars of the amount of the agent's remuneration for carrying out such work or, if that amount is not ascertainable at the time the information is given, particulars of the manner in which it will be calculated<sup>6</sup>;

187 (3) particulars of any payments which do not form part of the agent's remuneration for carrying out estate agency work or a contract or pre-contract deposit<sup>7</sup> but which, under the contract for estate agency work, will or may in certain circumstances be payable by the client to the agent or any other person and

- particulars of the circumstances in which any such payments will become payable<sup>8</sup>; and
- 188 (4) particulars of the amount of any payment falling within head (3) above or, if that amount is not ascertainable at the time the information is given, an estimate of that amount together with particulars of the manner in which it will be calculated<sup>9</sup>.

An estate agent must also explain to the client the meanings of the terms 'sole selling rights', 'sole agency' and 'ready, willing and able purchaser', or terms having similar purport or effect, if those terms are used by him in the course of carrying out estate agency work<sup>10</sup>.

Provision is made for the means of giving this information and the time when it must be given<sup>11</sup>. Failure to comply with any of these provisions renders the agency contract unenforceable other than by order of the court<sup>12</sup>.

1 As to the meaning of 'estate agency work' see PARA 240; for activities not amounting to 'estate agency work' for these purposes see PARA 241.

2 As to the meaning of 'client' see PARA 245 note 2.

3 As to the meaning of 'estate agent' see PARA 245 note 3.

4 Estate Agents Act 1979 s 18(1)(a).

5 Estate Agents Act 1979 s 18(2)(a).

6 Estate Agents Act 1979 s 18(2)(b).

7 'Contract deposit' means any sum paid by a purchaser which in whole or in part is, or is intended to form part of, the consideration for acquiring such an interest as is referred to in the Estate Agents Act 1979 s 12(1) (a) (see PARA 251) or for a connected contract; and which is paid by him at or after the time at which he acquires the interest or enters into an enforceable contract to acquire it (s 12(2)); and 'pre-contract deposit' means any sum paid by any person in whole or in part as an earnest of his intention to acquire such an interest as is referred to in s 12(1)(a) above, or in whole or in part towards meeting any liability of his in respect of the consideration for the acquisition of such an interest which will arise if he acquires or enters into an enforceable contract to acquire the interest, or in respect of a connected contract, and which is paid by him at a time before he either acquires the interest or enters into an enforceable contract to acquire it (s 12(3)). 'Connected contract', in relation to the acquisition of an interest in land, means a contract which is conditional upon such an acquisition or upon entering into an enforceable contract for such an acquisition (whether or not it is also conditional on other matters): s 12(4).

8 Estate Agents Act 1979 s 18(2)(c).

9 Estate Agents Act 1979 s 18(2)(d).

10 Estate Agents Act 1979 s 18(1)(b), (4)(a); Estate Agents (Provision of Information) Regulations 1991, SI 1991/859, reg 5(1), (2). As to the making of regulations see PARA 243 note 2, 245 note 5.

11 See the Estate Agents (Provision of Information) Regulations 1991, SI 1991/859, regs 2(2), 3(1), 4; and PARA 245. Where the information concerns the meaning of 'sole selling rights', 'sole agency' and 'ready, willing and able purchaser', the written explanation must have the form and content of the statement set out in the applicable part of the Schedule, provided that if, by reason of the provisions of the contract in which those terms appear, the respective explanations are in any way misleading, the content of the explanation must be altered so as accurately to describe the liability of the client to pay remuneration in accordance with those provisions: reg 5(1). The explanation of the terms must be given by the agent to his client in a document setting out the terms of the contract between them (whether that document be a written or printed agreement, a letter, terms of engagement or a form, and whether or not such document is signed by any of the parties): reg 5(3).

Subject to the proviso to reg 5(1) the explanations set out in the Schedule must be reproduced in the documents embodying them in the same form as they appear in that Schedule and without any material alterations or additions to the text, and must be shown prominently, clearly and legibly: reg 6(1). The wording of such explanations must be given no less prominence than that given to any other information in the document setting out the terms of the contract (as more particularly described in reg 5(3)) between the estate

agent and his client apart from the heading thereto, trade names, names of the parties and numbers or lettering subsequently inserted therein in handwriting or in type: reg 6(2).

12 See the Estate Agents Act 1979 s 18(5)-(7); and PARA 245.

## UPDATE

### 239-282 Estate Agencies

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/10. ESTATE AGENCIES AND ACCOMMODATION AGENCIES/(1) ESTATE AGENCIES/(iii) Dealing with Clients and Clients' Money/A. RELATIONSHIP WITH CLIENTS GENERALLY/247. Provision of information as to contractual variations.

#### 247. Provision of information as to contractual variations.

If at any time after an estate agent<sup>1</sup> and a client<sup>2</sup> have entered into a contract they are agreed that the terms of the contract should be varied so far as they relate to the carrying out of estate agency work<sup>3</sup> or any payment<sup>4</sup>, the agent must give the client details of any changes which, at the time the statement is given, fall to be made in the information which was given to the client before the contract was entered into<sup>5</sup>. Such information must be given, in writing<sup>6</sup>, at the time when, or as soon as is reasonably practicable after, the changes are agreed<sup>7</sup>.

1 As to the meaning of 'estate agent' see PARA 245 note 3.

2 As to the meaning of 'client' see PARA 245 note 2.

3 As to the meaning of 'estate agency work' see PARA 240; for activities not amounting to 'estate agency work' for these purposes see PARA 241.

4 Ie any payment falling within the Estate Agents Act 1979 s 18(2)(c) (see PARA 246).

5 Estate Agents Act 1979 s 18(3). As to the information which must be given to a client before a contract is entered into see PARAS 245-246.

6 Estate Agents (Provision of Information) Regulations 1991, SI 1991/859, reg 4. As to the making of regulations see PARA 243 note 2, 245 note 5.

7 Estate Agents (Provision of Information) Regulations 1991, SI 1991/859, regs 2(2), 3(2).

## UPDATE

### 239-282 Estate Agencies

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements

mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/10. ESTATE AGENCIES AND ACCOMMODATION AGENCIES/(1) ESTATE AGENCIES/(iii) Dealing with Clients and Clients' Money/A. RELATIONSHIP WITH CLIENTS GENERALLY/248. Pre-contract deposits.

## **248. Pre-contract deposits.**

As from a day to be appointed<sup>1</sup> no person may, in the course of estate agency work<sup>2</sup>, seek from any prospective purchaser<sup>3</sup> a payment which, if made, would constitute a pre-contract deposit<sup>4</sup> in excess of a prescribed limit<sup>5</sup> and if in the course of such work any person receives from a prospective purchaser a pre-contract deposit which exceeds such a limit, so much of that deposit as exceeds the limit must forthwith be either repaid to the prospective purchaser or paid to such other person as the prospective purchaser may direct<sup>6</sup>. Failure to comply with these requirements does not render any person liable to any criminal penalty nor constitute a ground for any civil claim<sup>7</sup>, but it may be taken into account<sup>8</sup> for the purpose of determining whether a person is unfit to carry out estate agency work<sup>9</sup>.

It is now settled that, unless otherwise agreed, an agent, including an estate agent, receives a deposit as a 'stakeholder'<sup>10</sup> and not as agent for the seller<sup>11</sup>. Thus, at any time until contract the purchaser has a right to demand the return of the deposit from the agent, and if the agent becomes insolvent or otherwise defaults the seller is not liable to the purchaser<sup>12</sup>.

1 At the date at which this volume states the law the Estate Agents Act 1979 s 19 (see the text and notes 2-9) had not been brought into force.

2 As to the meaning of 'estate agency work' see PARA 240; for activities not amounting to 'estate agency work' for these purposes see PARA 241.

3 I.e. a prospective purchaser who wishes to acquire an interest in land in the United Kingdom: Estate Agents Act 1979 s 19(1) (not yet in force). As to 'acquiring' and 'disposing of' an interest in land see PARA 240 note 3.

4 As to the meaning of 'pre-contract deposit' see PARA 246 note 7. In relation to a prospective purchaser, references in the Estate Agents Act 1979 s 19(1), (2) to a 'pre-contract deposit' are to be treated as references to the aggregate of all the payments which constitute pre-contract deposits in relation to his proposed acquisition of a particular interest in land in the United Kingdom: s 19(3) (not yet in force).

5 Estate Agents Act 1979 s 19(1) (not yet in force). The limit may be prescribed by the Secretary of State by regulations made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament (s 19(4), (5) (not yet in force)): it may be so prescribed as either a specific amount or a percentage or fraction of a price or other amount determined in any particular case in accordance with the regulations (s 19(4)). At the date at which this volume states the law no such regulations had been made. As to the making of regulations generally see PARA 243 note 2.

6 Estate Agents Act 1979 s 19(2) (not yet in force).

7 I.e. other than a claim for the recovery of such an excess as is referred to in the Estate Agents Act 1979 s 19(2) (not yet in force) (see the text and note 6).

8 I.e. in accordance with the Estate Agents Act 1979 s 3(1)(c) (see PARA 270).

9 Estate Agents Act 1979 s 19(6) (not yet in force) (amended by the Enterprise Act 2002 s 278, Sch 25 para 9(1), (11)(a)).

10 The term is used here in the loose sense of a person who holds money for two persons pending the happening of a particular event. An agent who receives a deposit is not, strictly speaking, a stakeholder because there has been no contract at that stage: see *Maloney v Hardy and Moorshead* [1971] 2 QB 442n, [1971] 2 All ER 630n, CA, per Russell LJ.

11 *Sorrell v Finch* [1977] AC 728, [1976] 2 All ER 371, HL. There are suggestions in that case that the deposit may be received on the seller's behalf if the seller expressly authorises the agent to accept deposits and the agent signs the receipt 'as agent for the seller'. However, quare whether that is consistent with the purchaser's right to demand the return of the deposit at any time until the contract has been concluded.

12 *Sorrell v Finch* [1977] AC 728, [1976] 2 All ER 371, HL. Once the contract has been completed the agent is liable to the seller for the deposit subject to his right to deduct commission and expenses. Where both the seller and purchaser claim the deposit, the agent should interplead. As to an estate agent's commission see PARA 103.

## UPDATE

### 239-282 Estate Agencies

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/10. ESTATE AGENCIES AND ACCOMMODATION AGENCIES/(1) ESTATE AGENCIES/(iii) Dealing with Clients and Clients' Money/A. RELATIONSHIP WITH CLIENTS GENERALLY/249. Land in which the agent has an interest.

#### 249. Land in which the agent has an interest.

An estate agent<sup>1</sup> may not enter into negotiations with any person with respect to the acquisition or disposal by that person of any land<sup>2</sup> in which the agent has a personal interest<sup>3</sup>, unless he has first disclosed the nature and extent of that interest<sup>4</sup>, and in any case where the result of a proposed disposal of an interest in land or of such a proposed disposal and other transactions would be that an estate agent would have a personal interest in that land, the agent may not enter into negotiations with any person with respect to the proposed disposal until he has disclosed to that person the nature and extent of that interest<sup>5</sup>. These restrictions apply where an estate agent is negotiating on his own behalf as well as where he is negotiating in the course of estate agency work<sup>6</sup>.

An estate agent may not seek or receive a contract deposit<sup>7</sup> or pre-contract deposit<sup>8</sup> in respect of the acquisition or proposed acquisition of a personal interest of his in land in the United Kingdom or of any other interest in any such land in which he has a personal interest<sup>9</sup>.

Failure to comply with these requirements does not render any person liable to any criminal penalty nor constitute a ground for any civil claim, but it may be taken into account<sup>10</sup> for the purpose of determining whether a person is unfit to carry out estate agency work<sup>11</sup>.

1    le a person who is engaged in estate agency work: Estate Agents Act 1979 s 21(1). As to the meaning of 'estate agency work' see PARA 240; for activities not amounting to 'estate agency work' for these purposes see PARA 241.



- 2 As to 'acquiring' and 'disposing of' an interest in land see PARA 240 note 3.
- 3 For these purposes, an estate agent has a personal interest in land if he has a beneficial interest in the land or in the proceeds of sale of any interest in it, or he knows or might reasonably be expected to know that his employer or principal, any employee or agent of his, or any associate of his or of any such person, has such a beneficial interest: s 21(5). As to the meaning of 'associate' see PARA 242.
- 4 Estate Agents Act 1979 s 21(1).
- 5 Estate Agents Act 1979 s 21(2).
- 6 Estate Agents Act 1979 s 21(3).
- 7 As to the meaning of 'contract deposit' see PARA 246 note 7.
- 8 As to the meaning of 'pre-contract deposit' see PARA 246 note 7.
- 9 Estate Agents Act 1979 s 21(4).
- 10 In accordance with the Estate Agents Act 1979 s 3(1)(c) (see PARA 270).
- 11 Estate Agents Act 1979 s 21(6) (amended by the Enterprise Act 2002 s 278, Sch 25 para 9(1), (11)(c)).

## UPDATE

### 239-282 Estate Agencies

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/10. ESTATE AGENCIES AND ACCOMMODATION AGENCIES/(1) ESTATE AGENCIES/(iii) Dealing with Clients and Clients' Money/A. RELATIONSHIP WITH CLIENTS GENERALLY/250. Keeping of permanent records.

### 250. Keeping of permanent records.

As from a day to be appointed<sup>1</sup> a person engaged in estate agency work<sup>2</sup> is required to keep permanent records<sup>3</sup>, and must ensure that there is included in those records<sup>4</sup>:

- 189 (1) information given relating to the services to be provided, remuneration and agreed contractual variations<sup>5</sup>;
- 190 (2) information given concerning the nature and extent of the agent's personal interest, if any, in a transaction<sup>6</sup>;
- 191 (3) any offer of a prescribed description received by the person concerned and any prescribed information relating to the making of the offer<sup>7</sup>;
- 192 (4) any action of a prescribed description taken by the person concerned in relation to such an offer and any prescribed information relating to that action<sup>8</sup>; and
- 193 (5) any other information or event of a prescribed description<sup>9</sup>.

The Secretary of State may by regulations<sup>10</sup> make provision as to the manner in which the permanent records are to be kept<sup>11</sup> and the place or places at which they are to be kept<sup>12</sup>. At the date at which this volume states the law no such regulations had been made.

1 The Estate Agents Act 1979 s 21A (see the text and notes 2-12) is added by the Consumers, Estate Agents and Redress Act 2007 s 54(1), as from a day to be appointed. At the date at which this volume states the law no such day had been appointed.

2 As to the meaning of 'estate agency work' see PARA 240; for activities not amounting to 'estate agency work' for these purposes see PARA 241. In the case of a person engaged in estate agency work in the course of employment the duties under the Estate Agents Act 1979 s 21A(1) are duties of the employer and not the employee: s 21A(2) (prospectively added: see note 1). If the person concerned is acting in the course of employment, it is also the duty of the employer to ensure that the record of the information or event referred to in heads (1)-(5) in the text is included in the permanent records; but the employer is not to be regarded as having breached his duty if he shows that he took such steps as were reasonably practicable to ensure that the duty to record such information or events (ie the duty under s 21A(3)) was complied with by his employees: s 21A(5) (as so prospectively added).

3 Estate Agents Act 1979 s 21A(1)(a) (prospectively added: see note 1).

4 Ie for a period of at least six years beginning with the day on which it is included: Estate Agents Act 1979 s 21A(1)(b) (prospectively added: see note 1).

5 Estate Agents Act 1979 s 21A(3), (4)(a) (prospectively added: see note 1). This is the information that the person concerned is required to disclose by s 18(1) or (3) and any prescribed information relating to the giving of that information (see PARAS 245-247).

6 Estate Agents Act 1979 s 21A(4)(b) (prospectively added: see note 1). This is the information that the person concerned is required to disclose by s 21(1) or (2) and any prescribed information relating to the disclosure of that information (see PARA 249).

7 Estate Agents Act 1979 s 21A(4)(c) (prospectively added: see note 1). 'Prescribed' means prescribed by regulations made by the Secretary of State (s 21A(7) (as so prospectively added)): any power to make regulations under s 21A is exercisable by statutory instrument which is be subject to annulment in pursuance of a resolution of either House of Parliament (s 21A(8) (as so prospectively added)). At the date at which this volume states the law no such regulations had been made. As to the making of regulations generally see PARA 243 note 2.

8 Estate Agents Act 1979 s 21A(4)(d) (prospectively added: see note 1). See note 7.

9 Estate Agents Act 1979 s 21A(4)(e) (prospectively added: see note 1). See note 7.

10 Any power to make regulations under the Estate Agents Act 1979 s 21A (prospectively added) is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: s 21A(8) (prospectively added: see note 1). As to the making of regulations generally see PARA 243 note 2.

11 Estate Agents Act 1979 s 21A(6)(a) (prospectively added: see note 1).

12 Estate Agents Act 1979 s 21A(6)(b) (prospectively added: see note 1).

## UPDATE

### 239-282 Estate Agencies

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/10. ESTATE AGENCIES AND ACCOMMODATION AGENCIES/(1) ESTATE AGENCIES/(iii) Dealing with Clients and Clients' Money/B. CLIENTS' MONEY/251. Clients' money and client accounts.

## **B. CLIENTS' MONEY**

### **251. Clients' money and client accounts.**

'Clients' money', in relation to a person engaged in estate agency work<sup>1</sup>, means any money received by him in the course of that work which is a contract<sup>2</sup> or pre-contract deposit<sup>3</sup> in respect of the acquisition of an interest in land in the United Kingdom, or in respect of a connected contract<sup>4</sup>. Any clients' money received by any person in the course of estate agency work is held by him on trust for the person entitled to call for it to be paid over to him or to be paid on his direction or to have it otherwise credited to him<sup>5</sup>.

A 'client account' is a current or deposit account which is with an institution authorised for the<sup>6</sup> purpose, is in the name of a person who is or has been engaged in estate agency work<sup>7</sup> and contains in its title the word 'client'<sup>8</sup>.

1 As to the meaning of 'estate agency work' see PARA 240; for activities not amounting to 'estate agency work' for these purposes see PARA 241.

2 As to the meaning of 'contract deposit' see PARA 246 note 7.

3 As to the meaning of 'pre-contract deposit' see PARA 246 note 7.

4 Estate Agents Act 1979 s 12(1). As to the meaning of 'connected contract' see PARA 246 note 7.

5 Estate Agents Act 1979 s 13(1)(a). If money is received by the estate agent as stakeholder, it is held by him on trust for the person who may become so entitled on the occurrence of the event against which the money is held: s 13(1)(b). See further, as to the estate agent as stakeholder, PARA 248.

6 Estate Agents Act 1979 s 14(2)(a). The financial institutions authorised for the purpose are those specified in the Estate Agents (Accounts) Regulations 1981, SI 1981/1520, Schedule (amended by SI 2001/1149): Estate Agents (Accounts) Regulations 1981, SI 1981/1520, reg 2.

These regulations were made under the Estate Agents Act 1979 s 14(3)-(7), which provides that the Secretary of State may make provision by regulations ('accounts regulations') as to the opening and keeping of client accounts, the keeping of accounts and records relating to clients' money and the auditing of those accounts; in relation to the opening and keeping of client accounts the regulations may in particular specify the institutions authorised for the purpose (s 14(4)(a)). As to client money and client accounts see PARAS 251-257. Accounts regulations are made by statutory instrument which are subject to annulment in pursuance of a resolution of either House of Parliament: s 14(3). As to the making of regulations generally see PARA 243 note 2.

A person who contravenes any provision of the Estate Agents Act 1979 or of accounts regulations as to the manner in which clients' money is to be dealt with or accounts and records relating to such money are to be kept commits an offence and is liable on summary conviction to a fine not exceeding level 4 on the standard scale: Estate Agents Act 1979 s 14(8)(a) (amended by virtue of the Criminal Justice Act 1982 s 46). As to offences by bodies corporate see PARA 242. As to defences see PARA 243 note 7. 'Standard scale' means the standard scale of maximum fines for summary offences as set out in the Criminal Justice Act 1982 s 37: see the Interpretation Act 1978 s 5, Sch 1 (definition added by the Criminal Justice Act 1988 s 170(1), Sch 15 para 58); and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 142. At the date at which this volume states the law, the standard scale is as follows: level 1, £200; level 2, £500; level 3, £1,000; level 4, £2,500; level 5, £5,000: Criminal Justice Act 1982 s 37(2) (substituted by the Criminal Justice Act 1991 s 17(1)). As to the determination of the amount of the fine actually imposed, as distinct from the level on the standard scale which it may not exceed, see the Criminal Justice Act 2003 s 164; and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 144.

The provisions of the Estate Agents Act 1979 ss 14, 15 (see the text and notes 7-8; and PARAS 252-254) as to the investment of clients' money, the keeping of accounts and records and accounting for interest have effect in

place of the corresponding duties which would be owed by a person holding clients' money as trustee under the general law: s 13(3).

7 Estate Agents Act 1979 s 14(2)(b).

8 Estate Agents Act 1979 s 14(2)(c).

## UPDATE

### 239-282 Estate Agencies

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/10. ESTATE AGENCIES AND ACCOMMODATION AGENCIES/(1) ESTATE AGENCIES/(iii) Dealing with Clients and Clients' Money/B. CLIENTS' MONEY/252. Duty to pay clients' money into client accounts.

#### 252. Duty to pay clients' money into client accounts.

Every person<sup>1</sup> who receives clients' money<sup>2</sup> in the course of estate agency work<sup>3</sup> must, without delay, pay the money into a client account<sup>4</sup> maintained by him or by a person in whose employment he is<sup>5</sup>. The sole exception to this rule concerns certain deposits not forming part of the consideration for the acquisition of an interest in land<sup>6</sup>.

Money other than clients' money may be paid into a client account only if it is the minimum required for the purpose of opening or maintaining the account or to restore in whole or part any money paid out of the account in contravention of accounts regulations<sup>7</sup>.

1 The every person other than the financial institutions specified in the Estate Agents (Accounts) Regulations 1981, SI 1981/1520, Schedule (amended by SI 2001/1149): Estate Agents (Accounts) Regulations 1981, SI 1981/1520, reg 3. As to the making of accounts regulations see PARA 251 note 6; such regulations may in particular specify any persons or classes of persons to whom, or any circumstances in which, the obligation imposed by the Estate Agents Act 1979 s 14(1) (see the text and notes 2-5) does not apply (s 14(4)(b)) and any circumstances in which money other than clients' money may be paid into a client account (see the text and note 6) (s 14(4)(c)).

2 As to the meaning of 'clients' money' see PARA 251.

3 As to the meaning of 'estate agency work' see PARA 240; for activities not amounting to 'estate agency work' for these purposes see PARA 241.

4 As to the meaning of 'client account' see PARA 251.

5 Estate Agents Act 1979 s 14(1).

6 Where part of a contract deposit paid by a purchaser is not, or is not intended to form part of, the consideration for acquiring an interest in land in the United Kingdom or for a connected contract, or part of a pre-contract deposit either is paid as an earnest of the payer's intention to acquire an interest in land in the United Kingdom or is not paid towards meeting any liability of the payer in respect of the consideration for the acquisition of such an interest which will arise if he acquires or enters into an enforceable contract to acquire the interest, and the money is received in cash or in any other form which it is practicable and lawful to split,

then part of the contract deposit referred to above, or any of the part of the pre-contract deposit referred to above which is not paid in respect of a connected contract, must not be paid into a client account: Estate Agents (Accounts) Regulations 1981, SI 1981/1520, reg 4(2).

7 Estate Agents (Accounts) Regulations 1981, SI 1981/1520, reg 4(1). See note 1.

## UPDATE

### 239-282 Estate Agencies

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/10. ESTATE AGENCIES AND ACCOMMODATION AGENCIES/(1) ESTATE AGENCIES/(iii) Dealing with Clients and Clients' Money/B. CLIENTS' MONEY/253. Payments out of client accounts.

### 253. Payments out of client accounts.

The occasions on which, and the persons to whom, money held in a client account<sup>1</sup> may be paid out are:

- 194 (1) in the case of money other than clients' money<sup>2</sup>, where it is no longer required for the specified purpose and is paid to the person entitled to it<sup>3</sup>;
- 195 (2) in the case of money paid into the account in contravention of accounts regulations<sup>4</sup>, where it is paid to the person entitled to it<sup>5</sup>;
- 196 (3) in the case of clients' money, where it is paid to the person who is entitled to call for it to be paid over to him or to be paid on his direction or to have it otherwise credited to him<sup>6</sup>;
- 197 (4) in the case of clients' money, in payment of any remuneration for, or in reimbursement of money expended in, carrying out estate agency work<sup>7</sup> to which the person in question is entitled, with the agreement of the person for whom the money is held<sup>8</sup>;
- 198 (5) in the case of clients' money, in the exercise of any lien on the money which is entitled to be exercised<sup>9</sup>; and
- 199 (6) in the case of clients' money, where it is transferred to another client account maintained by the person who received the money or by his employer<sup>10</sup>.

1 As to the meaning of 'client account' see PARA 251.

2 I.e. money paid into the account by virtue of the Estate Agents (Accounts) Regulations 1981, SI 1981/1520, reg 4(1) (see PARA 252). As to the meaning of 'clients' money' see PARA 251.

3 Estate Agents (Accounts) Regulations 1981, SI 1981/1520, reg 5(a). As to the making of accounts regulations see PARA 251 note 6; such regulations may in particular specify the occasions on which, and the persons to whom, money held in a client account may be paid out (Estate Agents Act 1979 14(4)(d)).

4 I.e. money paid into the account in contravention of the Estate Agents (Accounts) Regulations 1981, SI 1981/1520, reg 4 (see PARA 252).

5 Estate Agents (Accounts) Regulations 1981, SI 1981/1520, reg 5(b).

6 Estate Agents (Accounts) Regulations 1981, SI 1981/1520, reg 5(c)(i).

7 As to the meaning of 'estate agency work' see PARA 240; for activities not amounting to 'estate agency work' for these purposes see PARA 241.

8 Estate Agents (Accounts) Regulations 1981, SI 1981/1520, reg 5(c)(ii).

9 Estate Agents (Accounts) Regulations 1981, SI 1981/1520, reg 5(c)(iii). The fact that any person has or may have a lien on clients' money held by him does not affect the operation of the Estate Agents Act 1979 s 13 (clients' money held on trust or as agent: see PARA 251) and nothing in s 13 prevents such a lien from being given effect: s 13(5).

10 Estate Agents (Accounts) Regulations 1981, SI 1981/1520, reg 5(c)(iv). 'Employee' means a person engaged in estate agency work under a contract of employment, and 'employer' means his employer under that contract: reg 1(2). As to contracts of employment see **EMPLOYMENT** vol 39 (2009) PARA 1 et seq.

## UPDATE

### 239-282 Estate Agencies

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/10. ESTATE AGENCIES AND ACCOMMODATION AGENCIES/(1) ESTATE AGENCIES/(iii) Dealing with Clients and Clients' Money/B. CLIENTS' MONEY/254. Interest on clients' money.

### 254. Interest on clients' money.

A person engaged in estate agency work<sup>1</sup> who has received any clients' money<sup>2</sup> and does not hold it as stakeholder on trust for the person who may become entitled to it on the occurrence of the event against which it is held<sup>3</sup> must account to any other person who is for the time being entitled to that money for the interest earned or potentially earned on it<sup>4</sup>.

If money is held in a client account<sup>5</sup> which is a separate deposit account<sup>6</sup>, a client account which is not a separate deposit account<sup>7</sup>, or in circumstances where the money is required<sup>8</sup> to be held in a client account but is not so held<sup>9</sup>, the agent is required to account for interest or potential interest on that money if the amount of the sum held exceeds £500 and the interest which is, or, as the case may be, could have been, earned on the money for the person in question during the period for which it is held for him by keeping it in a separate deposit account at the institution concerned is at least £10<sup>10</sup>. If the person who has received any clients' money is a specified institution<sup>11</sup> or an employee of such an institution, and accordingly<sup>12</sup> does not pay it into a client account<sup>13</sup>, he is required to account for interest in any case in which interest is not credited to the person for the time being entitled to the money in the normal course of business and the amount of the sum held exceeds £500 and the interest which could have been earned on the money during the period for which it is held if it had been kept in a separate deposit account at the institution is at least £10<sup>14</sup>.

Failure to comply with these requirements does not render any person liable to any criminal penalty, but it may form the basis of a civil claim for interest which was or should have been earned on clients' money and may be taken into account<sup>15</sup> for the purpose of determining whether a person is unfit to carry out estate agency work<sup>16</sup>.

1 As to the meaning of 'estate agency work' see PARA 240; for activities not amounting to 'estate agency work' for these purposes see PARA 241.

2 As to the meaning of 'clients' money' see PARA 251.

3 As to the holding of clients' money generally see PARA 251.

4 See the Estate Agents (Accounts) Regulations 1981, SI 1981/1520, reg 7; and the text and notes 5-14. Regulation 7 is made pursuant to the Estate Agents Act 1979 s 15, under which it is provided that accounts regulations (see PARA 251 note 6) may make provision for requiring a person who has received any clients' money to account, in such cases as may be prescribed by the regulations, to the person who is or becomes entitled to the money for the interest which was, or could have been, earned by putting the money in a separate deposit account at an institution authorised for the purposes of s 14: s 15(1), (6). The cases in which a person may be required by accounts regulations so to account for interest may be defined, amongst other things, by reference to the amount of the sum held or received by him or the period for which it is likely to be retained, or both: s 15(2). A person who maintains a client account in which he keeps clients' money generally is not otherwise liable to account to any person for interest received by him on money in that account (subject to the operation of any arrangement in writing, whenever made, between a person engaged in estate agency work and any other person as to the application of, or of any interest on, money in which that other person has or may have an interest): s 15(3), (4).

5 As to the meaning of 'client account' see PARA 251.

6 Estate Agents (Accounts) Regulations 1981, SI 1981/1520, reg 7(1)(a). The interest earned on the money must be accounted for: reg 7(1)(a).

7 Estate Agents (Accounts) Regulations 1981, SI 1981/1520, reg 7(1)(b). The interest which could have been earned on the money if it had been kept in a separate deposit account at the institution concerned must be accounted for: reg 7(1)(b).

8 I.e. under the Estate Agents Act 1979 and the Estate Agents (Accounts) Regulations 1981, SI 1981/1520.

9 Estate Agents (Accounts) Regulations 1981, SI 1981/1520, reg 7(1)(c). The interest which could have been earned on the money if it had been kept in a separate deposit account at whichever of the specified institutions listed in the Schedule (amended by SI 2001/1149) in which a current or deposit account is held by the person on whom this is imposed was, on the day when it could first have been put in such an account, offering the highest rate of interest offered by any of those institutions on money kept in such an account, or if no such account is so held, at whichever of the said institutions was on the day in question offering the highest rate of interest offered by any of the institutions on money kept in such an account, must be accounted for: Estate Agents (Accounts) Regulations 1981, SI 1981/1520, reg 7(1)(c).

10 Estate Agents (Accounts) Regulations 1981, SI 1981/1520, reg 7(2).

11 I.e. an institution listed in the Estate Agents (Accounts) Regulations 1981, SI 1981/1520, Schedule (amended by SI 2001/1149).

12 I.e. under the Estate Agents (Accounts) Regulations 1981, SI 1981/1520, reg 3 (see PARA 252).

13 Estate Agents (Accounts) Regulations 1981, SI 1981/1520, reg 7(1)(d). The interest which could have been earned on the money if it had been kept in a separate deposit account at the specified institution must be accounted for: reg 7(1)(d).

14 Estate Agents (Accounts) Regulations 1981, SI 1981/1520, reg 7(3).

15 I.e. in accordance with the Estate Agents Act 1979 s 3(1)(c) (see PARA 270).

16 Estate Agents Act 1979 s 15(5) (amended by the Enterprise Act 2002 s 278, Sch 25 para 9(1), (9)(c)).

## UPDATE

## 239-282 Estate Agencies

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/10. ESTATE AGENCIES AND ACCOMMODATION AGENCIES/(1) ESTATE AGENCIES/(iii) Dealing with Clients and Clients' Money/B. CLIENTS' MONEY/255. Insurance cover for clients' money.

### 255. Insurance cover for clients' money.

As from a day to be appointed<sup>1</sup> a person may not accept clients' money<sup>2</sup> in the course of estate agency work<sup>3</sup> unless there are in force authorised arrangements under which, in the event of his failing to account for such money to the person entitled to it, his liability will be made good by another<sup>4</sup>, and no person carrying on estate agency work will be permitted to use the description 'estate agent' or so use any name or in any way hold himself out as to indicate or reasonably be understood to indicate that he is carrying on a business in the course of which he is prepared to act as a broker in the acquisition or disposal of interests in land unless information relating to authorised arrangements is displayed at his place of business<sup>5</sup> and included in any relevant document<sup>6</sup> issued or displayed in connection with his business<sup>7</sup>.

Failure to comply with these requirements<sup>8</sup> is an offence<sup>9</sup>: however, the Office of Fair Trading<sup>10</sup> may, on an application made to it in that behalf<sup>11</sup>, exempt a person engaged in estate agency work from all or any of the requirements relating to the making of insurance arrangements<sup>12</sup> if it considers that such an exemption may be made without loss of adequate protection to consumers, and may issue to such a person a certificate of exemption<sup>13</sup>. Failure to comply with any condition of exemption specified in a current certificate of exemption is an offence<sup>14</sup>. Persons may also be excluded from the insurance requirements by regulations<sup>15</sup>.

1 At the date at which this volume states the law the Estate Agents Act 1979 ss 16, 17 (see the text and notes 2-15) had not been brought into force.

2 As to the meaning of 'clients' money' see PARA 251.

3 As to the meaning of 'estate agency work' see PARA 240; for activities not amounting to 'estate agency work' for these purposes see PARA 241.

4 Estate Agents Act 1979 s 16(1) (not yet in force). Every guarantee entered into by a person (the 'insurer') who provides authorised arrangements covering another person (the 'agent') carrying on estate agency work enures for the benefit of every person from whom the agent has received clients' money as if the guarantee were contained in a contract made by the insurer with every such person, and, where the guarantee is given by two or more insurers, they had bound themselves jointly and severally: s 16(3) (not yet in force).

Regulations may be made specifying arrangements which are authorised: s 16(2)(b) (not yet in force). Regulations may also specify the terms and conditions upon which any payment is to be made under such arrangements and any circumstances in which the right to any such payment may be excluded or modified (s 16(2)(c) (not yet in force)); and provide that any limit on the amount of any such payment is to be not less than a specified amount (s 16(2)(d) (not yet in force)). Regulations under s 16 are made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: s 16(2). As to the making of regulations generally see PARA 243 note 2. At the date at which this volume states the law no such regulations had been made.



5 For these purposes any business premises at which a person carries on estate agency work and to which the public has access is a place of business of his: Estate Agents Act 1979 s 16(5)(a) (not yet in force).

6 For these purposes 'relevant document' means any advertisement, notice or other written material which might reasonably induce any person to use the services of another in connection with the acquisition or disposal of an interest in land: Estate Agents Act 1979 s 16(5)(b) (not yet in force).

7 Estate Agents Act 1979 s 16(4) (not yet in force). Regulations may be made requiring a person providing authorised arrangements covering any person carrying on estate agency work to issue a certificate in a form specified in the regulations certifying that arrangements complying with the regulations have been made with respect to that person (s 16(2)(e) (not yet in force)), and prescribing any matter required to be prescribed for the purposes of s 16(4) (s 16(2)(f) (not yet in force)). At the date at which this volume states the law no such regulations had been made.

8 Ie the requirements of the Estate Agents Act 1979 s 16(1) or (4) or regulations under s 16(2) (see the text and notes 1-7).

9 Estate Agents Act 1979 s 16(6) (not yet in force). A person guilty of this offence is liable on conviction on indictment or summary conviction to a fine which, on summary conviction, is not to exceed the statutory maximum: s 16(6) (not yet in force). As to offences by bodies corporate see PARA 242. As to defences see PARA 243 note 7. As to the statutory maximum see PARA 203 note 3.

10 As to the Office of Fair Trading see PARA 278.

11 An application for an exemption must state the reasons why the applicant considers that he should be granted a certificate of exemption, and must be accompanied by the prescribed fee: Estate Agents Act 1979 s 17(2) (not yet in force). If the Office of Fair Trading decides to refuse such an application it must give the applicant notice of its decision and of the reasons for it, including any facts which in its opinion justify the decision: s 17(5) (not yet in force) (s 17(1), (5), (6) amended by the Enterprise Act 2002 s 278(1), Sch 25 para 9(1), (10)).

If a person who made an application under the Estate Agents Act 1979 s 17(1) is aggrieved by a decision of the Office of Fair Trading either to refuse his application or to grant him a certificate of exemption subject to conditions, he may appeal against the decision to the Secretary of State: s 17(6) (not yet in force). Provision is made for the procedure for appeals: see s 7(2)-(6); and PARA 275.

Any notice which is to be given under the Estate Agents Act 1979 to any person by the Office of Fair Trading (the 'OFT'), any penalty charge notice which is to be given under s 23B(1) (see PARA 264) by a duly authorised officer of an enforcement authority other than the OFT (see PARA 278), and any notice which is to be given by such an authority under Sch 4 para 5(1)(c) (see PARA 265), may be so given by delivering it to the person, leaving it at his proper address, or sending it by post to him at that address: s 29(1), Sch 4 para 10 (s 29(1), (3) amended by the Enterprise Act 2002 s 278, Sch 25 para 9(1), (14)(a); Estate Agents Act 1979 Sch 4 added by the Consumers, Estate Agents and Redress Act 2007 Sch 6, paras 1, 4). In the case of a body corporate or unincorporated association, the notice may be given to the secretary or clerk of that body or association, and in the case of a partnership, it must be given to a partner or a person having the control or management of the partnership business: Estate Agents Act 1979 s 29(2). The proper address of any person to whom a notice is to be given is his last-known address, except that in the case of a body corporate or its secretary or clerk, it is the address of the registered or principal office of that body, in the case of an unincorporated association or its secretary or clerk, it is that of the principal office of that association, and in the case of a partnership or a person having the control or management of the partnership business, it is that of the principal office of the partnership (s 29(4)); for these purposes the principal office of a company registered outside the United Kingdom or of an unincorporated association or partnership carrying on business outside the United Kingdom is its principal office within the United Kingdom (s 29(4)). If the person to be given the notice has specified an address within the United Kingdom other than his proper address (within the meaning of s 29(4)) as the one at which he or someone on his behalf will accept notices under the Estate Agents Act 1979, that address is also treated for the purposes of s 29(4) as his proper address: s 29(5). Any application or other document which may be made or given to the OFT may be so made or given by sending it by post to the OFT at such address as may be specified for the purposes of this Act by a general notice: s 29(3) (as so amended). 'General notice' means a notice published by the OFT at a time and in a manner appearing to it suitable for securing that the notice is seen within a reasonable time by persons likely to be affected by it: s 33(1) (amended by the Enterprise Act 2002 Sch 25 para 9(15)(b)).

12 Ie all or any of the provisions of the Estate Agents Act 1979 s 16(1) or of regulations under s 16(2) (see the text and notes 1-4).

13 Estate Agents Act 1979 s 17(1) (not yet in force) (as amended: see note 11). A certificate of exemption may impose conditions of exemption on the person to whom it is issued, and may be issued to have effect for a period specified in the certificate or without limit of time: s 17(3) (not yet in force). If and so long as a certificate

of exemption has effect and the person to whom it is issued complies with any conditions of exemption specified in the certificate, that person remains exempt, to the extent so specified, from the provisions of s 16(1) and of any regulations made under s 16(2) : s 17(4) (not yet in force).

The OFT may by notice require any person to furnish to it such information as may be specified or described in the notice or to produce to it any documents so specified or described in order to assist it in the exercise of any of its functions under s 17: s 9(1)(b) (s 9(1), (6) amended by the Enterprise Act 2002 s 278(1), Sch 25 para 9(1), (8); Estate Agents Act 1979 s 9(6) amended by the Equality Act 2006 ss 40, 91, Sch 3 paras 36, 37). A notice may specify the way in which and the time within which it is to be complied with and, in the case of a notice requiring the production of documents, the facilities to be afforded for making extracts, or taking copies of, the documents; and may be varied or revoked by a subsequent notice: Estate Agents Act 1979 s 9(2). As to the giving of notices see PARA 255 note 11. Particular duties are imposed on the Commission for Equality and Human Rights to furnish to the OFT such information relating to any finding, notice, injunction or order falling within Sch 1 para 2 (see PARA 269) as is in its possession and appears to the Commission to be relevant to the functions of the OFT under the Estate Agents Act 1979: see s 9(6) (as so amended). A person who has acted as counsel or solicitor for any person is not by these provisions required to disclose any privileged communication made by or to him in that capacity: s 9(3). It is an offence to make, in furnishing any information in compliance with such a notice, any statement which the person making the statement knows to be false in a material particular or recklessly to make any statement which is false in a material particular or with intent to deceive, to produce in compliance with such a notice a document which is false in a material particular, and until 1 October 2008 it is also an offence to refuse or wilfully neglect to comply with such a notice (s 9(4)(a)-(c) (s 9(4)(a) repealed, s 9(4)(b) amended, by the Consumers, Estate Agents and Redress Act 2007 s 58(3), Sch 8, as from 1 October 2008 (see the Consumers, Estate Agents and Redress Act 2007 (Commencement No 4) Order 2008, SI 2008/905))). The amendment of the Estate Agents Act 1979 s 9(4)(b) is consequential on the repeal of s 9(4)(a) and does not affect the meaning of this paragraph. A person guilty of this offence is liable on conviction or indictment or on summary conviction to a fine which, on summary conviction, must not exceed the statutory maximum: s 9(4).

14 Estate Agents Act 1979 s 17(7) (not yet in force). A person guilty of this offence is liable on conviction on indictment or on summary conviction to a fine which, on summary conviction, must not exceed the statutory maximum: s 17(7) (not yet in force).

15 Estate Agents Act 1979 16(2)(a) (not yet in force). At the date at which this volume states the law no such regulations had been made.

## UPDATE

### 239-282 Estate Agencies

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/10. ESTATE AGENCIES AND ACCOMMODATION AGENCIES/(1) ESTATE AGENCIES/(iii) Dealing with Clients and Clients' Money/B. CLIENTS' MONEY/256. Accounts and records.

### 256. Accounts and records.

Any person who receives client's money<sup>1</sup> in the course of estate agency work<sup>2</sup> is under a duty to keep such accounts and records relating to clients' money received, held or paid out as are sufficient to show that he has discharged the duty<sup>3</sup> to keep client accounts<sup>4</sup> and to show and explain readily at any time all dealings with the money to which such accounts relate<sup>5</sup>. Any accounts and records so kept must be retained for six years after the end of the accounting period<sup>6</sup> to which they relate<sup>7</sup>.

If a person ceases to be engaged in the estate agency work in which he has been engaged and the accounts and records relating to clients' money received by him are handed over to another person, that person is required to keep the accounts and records required to be kept under these provisions in place of the first person<sup>8</sup>.

Failure to comply with these requirements is an offence<sup>9</sup>.

1 As to the meaning of 'clients' money' see PARA 251.

2 Ie including an employer in the case of money received by his employee (Estate Agents (Accounts) Regulations 1981, SI 1981/1520, reg 6(1)), but not including an employee who pays clients' money received by him without delay into a client account maintained by his employer (reg 6(2)(b)) or any of the persons listed in the Schedule (amended by SI 2001/1149) or to an employee of any such person (Estate Agents (Accounts) Regulations 1981, SI 1981/1520, reg 6(2)(a)). As to the meanings of 'employer' and 'employee' see PARA 253 note 10. As to the meaning of 'estate agency work' see PARA 240; for activities not amounting to 'estate agency work' for these purposes see PARA 241. As to the meaning of 'client account' see PARA 251.

As to the making of accounts regulations see PARA 251 note 6; such regulations may in particular make provision requiring accounts to be drawn up in respect of specified accounting periods and to be audited by a qualified auditor within a specified time after the end of each such period (Estate Agents Act 1979 s 14(5)(a)); requiring the auditor to report whether in his opinion the requirements of the Estate Agents Act 1979 and of the accounts regulations have been complied with or have been substantially complied with (s 14(5)(b)); as to the matters to which such a report is to relate and the circumstances in which a report of substantial compliance may be given (s 14(5)(c)); and requiring a person who maintains a client account to produce on demand to a duly authorised officer of an enforcement authority the latest auditor's report (s 14(5)(d)). As to enforcement authorities see PARA 278. 'Qualified auditor' in s 14(5)(a) means a person who is eligible for appointment as a company auditor under the Companies Act 1989 s 25 (see **COMPANIES** vol 15 (2009) PARA 969) or corresponding Northern Irish legislation; however a person is not a qualified auditor for the purposes of the Estate Agents Act 1979 s 14(5)(a) if, in the case of a client account maintained by a company, he is ineligible for appointment as auditor to the company by virtue of the Companies Act 1989 Pt II (ss 24-54) (see **COMPANIES** vol 15 (2009) PARA 969 et seq) or corresponding Northern Irish legislation: Estate Agents Act 1979 s 14(6), (7) (substituted by SI 1991/1997).

Note that, as from a day to be appointed, the Companies Act 1989 is repealed and replaced by the Companies Act 2006: at the date at which this volume states the law no such day had been appointed.

3 Ie the duty imposed by the Estate Agents Act 1979 s 14 (see PARAS 251-253).

4 Such accounts and records must be such as to show, in the case of clients' money received:

- 40 (1) the amount (Estate Agents (Accounts) Regulations 1981, SI 1981/1520, reg 6(3)(a)(i));
- 41 (2) the name and address of the payer (reg 6(3)(a)(ii));
- 42 (3) whether the sum paid is a contract or a pre-contract deposit and, in either case, whether it is or includes any sum in respect of a connected contract (reg 6(3)(a)(iii));
- 43 (4) if the sum paid includes any such money as is referred to in reg 4(2) (see PARA 252), for what purposes and in what form it is received (reg 6(3)(a)(iv));
- 44 (5) the interest in land to which the money relates (reg 6(3)(a)(v));
- 45 (6) the person wishing to dispose of such an interest (reg 6(3)(a)(vi));
- 46 (7) the capacity in which the money is received and (where known by the person upon whom the duty is imposed) is from time to time held (whether as agent, bailee, stakeholder or in any other capacity) (reg 6(3)(a)(vii));
- 47 (8) the identity of the person for whom the money has been received and (where known) is from time to time held (reg 6(3)(a)(viii)); and
- 48 (9) the date of its receipt (reg 6(3)(a)(ix)).

As to the meanings of 'contract deposit', 'pre-contract deposit' and 'connected contract' see PARA 246 note 7.

The records must:

- 49 (a) be kept in such manner as to show separately all clients' money held by reference to the interest in land to which it relates (reg 6(3)(b));
- 50 (b) in the case of any payment out of a client account, be such as to show the amount, the identity of the payee, the date of the payment, any interest in land to which the money relates and such other information as may be necessary to show the corresponding payment into the account, the occasion on which the payment is made and, where the payment is made in accordance with reg 5(c)(ii) or (iii) (see PARA 253), such particulars as may be necessary to enable any information (and changes therein) required to be given to clients under the Estate Agents Act 1979 s 18 (see PARAS 245-247) and regulations made thereunder to be identified (Estate Agents (Accounts) Regulations 1981, SI 1981/1520, reg 6(3)(c));
- 51 (c) include counterfoils kept or duplicate copies of all receipts issued in respect of clients' money received which must contain the particulars required to be shown in the accounts and records under reg 6(3)(a)(i)-(v), (ix) (see above) (reg 6(3)(d)); and
- 52 (d) in the case of any sum transferred from one client account to another, be such as to show the occasion for the transfer and to enable the corresponding payment into the account from which the transfer is made to be identified, except sums transferred between a specified client current account and a specified client deposit account in both of which clients' money is kept generally (reg 6(3)(e)).

Where under reg 6 accounts and records are required to be kept so as to show the interest in land to which any clients' money relates, or by reference to such an interest, the requirement is taken to be complied with only if the land as well as the nature of the interest therein are identified: reg 6(5).

5 Estate Agents (Accounts) Regulations 1981, SI 1981/1520, reg 6(1). This includes the title of the client account into which the money is paid, the date of such payment and the identity of the institution with which that account is held, any payments out (other than those mentioned in the exception to reg 6(3)(e) (see note 4)) and all dealings with any other money which may have been dealt with through that account: reg 6(1).

6 'Accounting period' means a period of not more than 12 months in respect of which accounts required to be kept under the Estate Agents (Accounts) Regulations 1981, SI 1981/1520, reg 6 are drawn up; provided that an accounting period may end on a date not more than seven days after the end of a period of 12 months: reg 1(2).

7 Estate Agents (Accounts) Regulations 1981, SI 1981/1520, reg 6(4).

8 Estate Agents (Accounts) Regulations 1981, SI 1981/1520, reg 6(6).

9 Estate Agents Act 1979 s 14(8)(a). A person who commits this offence is liable on summary conviction to a fine not exceeding level 4 on the standard scale: s 14(8) (amended by virtue of the Criminal Justice Act 1982 s 46). As to offences by bodies corporate see PARA 242. As to defences see PARA 243 note 7. As to the standard scale see PARA 251 note 6.

## UPDATE

### 239-282 Estate Agencies

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

### 256 Accounts and records

NOTE 2--Estate Agents Act 1979 s 14(6), (7) amended to take account of the coming into force of the Companies Act 2006: SI 2008/948.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/10. ESTATE AGENCIES AND ACCOMMODATION AGENCIES/(1) ESTATE AGENCIES/(iii) Dealing with Clients and Clients' Money/B. CLIENTS' MONEY/257. Audit.

## **257. Audit.**

Any person who is required<sup>1</sup> to keep accounts must draw them up in respect of consecutive accounting periods<sup>2</sup> and have them audited by a qualified auditor<sup>3</sup> within six months after the end of each accounting period<sup>4</sup>. The auditor must report to such persons whether in his opinion the statutory requirements as to the manner in which clients' money is to be dealt with<sup>5</sup> have been complied with or have been substantially complied with<sup>6</sup>. If he reports that in his opinion those requirements have not been complied with or substantially complied with he must specify in his report the matters in respect of which it appears to him that the said requirements have not been complied with or substantially complied with<sup>7</sup>; and if he is unable to form an opinion as to whether or not the said requirements have been complied with or substantially complied with, he must specify in his report the matters in respect of which he has been unable to satisfy himself and the reasons therefor<sup>8</sup>.

A person who maintains a client account<sup>9</sup> must produce on demand to a duly authorised officer of an enforcement authority<sup>10</sup> the latest auditor's report relating to the account<sup>11</sup>: failure to do so is an offence<sup>12</sup>.

1    le under the Estate Agents (Accounts) Regulations 1981, SI 1981/1520, reg 6 (see PARA 256). As to the making of accounts regulations see PARA 251 note 6; and see also, with regard to the auditing of accounts, PARA 256 note 2.

2    As to the meaning of 'accounting period' see PARA 256 note 6. An employee who is required to keep accounts under the Estate Agents (Accounts) Regulations 1981, SI 1981/1520, reg 6 must adopt the same accounting period in respect of those accounts as his employer: reg 8(2). As to the meanings of 'employer' and 'employee' see PARA 253 note 10.

3    As to a 'qualified auditor' for these purposes see the Estate Agents Act 1979 s 14(6), (7); and PARA 256 note 2.

4    Estate Agents (Accounts) Regulations 1981, SI 1981/1520, reg 8(1).

5    le the requirements of the Estate Agents Act 1979 and the Estate Agents (Accounts) Regulations 1981, SI 1981/1520.

6    Estate Agents (Accounts) Regulations 1981, SI 1981/1520, reg 8(3). The auditor may report that the said requirements have been substantially complied with if in his opinion they have been complied with except so far as concerns certain trivial breaches due to clerical errors or mistakes in book-keeping, all of which were rectified on discovery, and none of which in his opinion resulted in any loss to any person entitled to the clients' money: reg 8(4). As to the meaning of 'clients' money' see PARA 251.

For the purpose of making his report under reg 8(3) the auditor must ascertain from the person to whom he is reporting particulars of all bank accounts kept, maintained or operated by him or his employee in the course of estate agency work at any time during the accounting period to which the report relates and so examine the accounts and records of that person as to enable him to verify whether they comply with the requirements of reg 6, for which purpose he may ask for such further information and explanations as he may consider necessary (reg 8(7)) (although nothing in reg 8(7) requires the auditor either to extend his inquiries beyond the information contained in the relevant documents produced to him, supplemented by such information and explanations as he may obtain from the person to whom he is making his report or to consider whether the accounts and records have been properly kept in accordance with reg 6 at any time other than the time at which his examination of those accounts and records takes place (reg 8(8))).

7    Estate Agents (Accounts) Regulations 1981, SI 1981/1520, reg 8(5).

8    Estate Agents (Accounts) Regulations 1981, SI 1981/1520, reg 8(6).

9    As to the meaning of 'client account' see PARA 251.

10 As to enforcement authorities see PARA 278.

11 Estate Agents (Accounts) Regulations 1981, SI 1981/1520, reg 8(9).

12 Estate Agents Act 1979 s 14(8)(b). A person who commits this offence is liable on summary conviction to a fine not exceeding level 4 on the standard scale: s 14(8) (amended by virtue of the Criminal Justice Act 1982 s 46). As to offences by bodies corporate see PARA 242. As to defences see PARA 243 note 7. As to the standard scale see PARA 251 note 6.

## UPDATE

### 239-282 Estate Agencies

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/10. ESTATE AGENCIES AND ACCOMMODATION AGENCIES/(1) ESTATE AGENCIES/(iv) Redress Schemes/258. Redress schemes for residential estate agents.

## (iv) Redress Schemes

### 258. Redress schemes for residential estate agents.

Provision is made for the establishment of schemes, known as 'redress schemes', providing for the investigation and determination of complaints<sup>1</sup> against persons who engage in estate agency work<sup>2</sup> in relation to residential property<sup>3</sup>. 'Residential property' means any land that consists of or includes a building or part of a building<sup>4</sup> the whole or part of which is used as a dwelling or as more than one dwelling<sup>5</sup> or that is (or is to be) offered for sale on the basis that the whole or part of it is suitable for such use or is intended to be so suitable by the time the seller disposes of his interest in it<sup>6</sup>. The Secretary of State may by order exclude land of a specified description from these provisions, and any land of a description so specified will not be 'residential property' for these purposes<sup>7</sup>.

Complaints under a redress scheme are investigated and determined by an independent person known as the 'ombudsman'<sup>8</sup>.

1 A 'complaint' is a complaint made by a person by virtue of his being or having been a seller or buyer of residential property; 'seller', in relation to residential property, means a person who claims that he is or may become interested in disposing of an interest in land in respect of that property (and includes a person who disposes of such an interest); and 'buyer', in relation to residential property, means a person who claims that he is or may become interested in acquiring an interest in land in respect of that property (and includes a person who acquires such an interest): Estate Agents Act 1979 s 23A(8)(c)-(e), (10), Sch 3 para 16 (ss 23A, 23C, Sch 3 added by the Consumers, Estate Agents and Redress Act 2007 Sch 6 paras 1-3). As to references to the 'disposal' of an interest in land see PARA 240 note 3.

2 As to the meaning of 'estate agency work' see PARA 240; for activities not amounting to 'estate agency work' for these purposes see PARA 241.

3 Estate Agents Act 1979 s 23A(1), (8)(a) (as added: see note 1).

4 This reference to a building or part of a building (so far as relating to the Estate Agents Act 1979 s 23C(2)(b) (see the text and note 6)) includes a reference to a building or part that is being or is to be constructed: s 23C(3) (as so added).

5 Estate Agents Act 1979 s 23C(1)(a), (2)(a) (as added: see note 1).

6 Estate Agents Act 1979 s 23C(2)(b) (as added: see note 1).

7 Estate Agents Act 1979 s 23C(1)(b) (as added: see note 1). A description of land specified by order under s 23C(1)(b) may be framed by reference to the purpose or purposes for which the land (or part of it) is or is intended to be used: s 23C(4) (as so added). The power to make an order under s 23C(1)(b) is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: s 23C(5) (as so added). As to the making of orders generally see PARA 243 note 2. At the date at which this volume states the law no such orders had been made.

8 Estate Agents Act 1979 s 23C(8)(a) (as added: see note 1). For the purposes of the law relating to defamation, proceedings under an approved redress scheme (see PARA 259 et seq) in relation to the investigation and determination of a complaint are treated in the same way as proceedings before a court: Sch 3 para 15 (as so added).

## UPDATE

### 239-282 Estate Agencies

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/10. ESTATE AGENCIES AND ACCOMMODATION AGENCIES/(1) ESTATE AGENCIES/(iv) Redress Schemes/259. Approval of redress schemes by Office of Fair Trading.

### 259. Approval of redress schemes by Office of Fair Trading.

The Office of Fair Trading<sup>1</sup> (the 'OFT') may approve redress schemes<sup>2</sup> for residential estate agents<sup>3</sup> if it considers that the provisions of the scheme<sup>4</sup> and the manner in which it will be operated (so far as can be judged from facts known to the authority)<sup>5</sup> are satisfactory<sup>6</sup>. The OFT must not, however, approve a scheme unless it considers that it makes satisfactory provision about:

200 (1) the complaints<sup>7</sup> which may be made under the scheme<sup>8</sup>;

201 (2) the ombudsman's duties and powers in relation to the investigation and determination of complaints<sup>9</sup>;

202 (3) the redress which the ombudsman may require members to provide to complainants<sup>10</sup>;

203 (4) the enforcement of any requirement to provide redress imposed on a member in accordance with the scheme<sup>11</sup>; and

204 (5) the provision of information by the ombudsman or the scheme administrator<sup>12</sup> to persons exercising functions under other approved schemes, persons exercising functions under other consumer redress schemes, and the OFT or any other person

exercising regulatory functions in relation to the activities of persons engaging in estate agency work<sup>13</sup>,

or if it considers that the scheme provides for membership to be revoked on any unfair grounds<sup>14</sup>.

Where the OFT is proposing, or has decided, to refuse an application for approval it must notify the applicant<sup>15</sup>. The scheme administrator of an approved scheme must notify the OFT of any change to the scheme<sup>16</sup>.

1 As to the Office of Fair Trading see PARA 278.

2 le for the purposes of the Estate Agents Act 1979 s 23A (see PARAS 258, 262-263). As to the meaning of 'redress scheme' see PARA 258. An application for approval of a redress scheme must be made in such manner as the OFT may determine and be accompanied by such information as the OFT may require: s 23A(10), Sch 3 para 6 (s 23A, Sch 3 added by the Consumers, Estate Agents and Redress Act 2007 Sch 6 paras 1-3).

3 Estate Agents Act 1979 s 23A(8)(b)(i), Sch 3 para 1 (as added: see note 2).

4 Estate Agents Act 1979 Sch 3 para 2(1)(a) (as added: see note 2).

5 Estate Agents Act 1979 Sch 3 para 2(1)(b) (as added: see note 2).

6 le for the purposes of the Estate Agents Act 1979 s 23A (see PARAS 258, 262-263). In determining whether a scheme, or any provisions mentioned in Sch 3 para 2(2) (see the text and notes 7-11), are satisfactory the OFT must have regard to the interests of members of the scheme and of sellers and buyers of residential properties and such principles as in the opinion of the OFT constitute generally accepted principles of best practice in relation to consumer redress schemes and it is reasonable to regard as applicable to the scheme: Sch 3 para 3(1) (as added: see note 2). In considering the interests of members of the scheme and of sellers and buyers of residential properties the OFT may have regard to the number of other redress schemes which are (or are likely to become) approved redress schemes: Sch 3 para 3(2) (as so added). As to the meanings of 'buyer' and 'seller' see PARA 258 note 1.

7 As to the meaning of 'complaint' see PARA 258 note 1. Such complaints may include complaints about non-compliance with the provisions of a code of practice or other document: Estate Agents Act 1979 Sch 3 para 2(2) (a) (as added: see note 2).

8 Estate Agents Act 1979 Sch 3 para 2(2)(a) (as added: see note 2).

9 Estate Agents Act 1979 Sch 3 para 2(2)(b) (as added: see note 2). These powers may include power to decide not to investigate or determine a particular complaint: Sch 3 para 2(2)(b) (as so added). 'Ombudsman' means the independent person mentioned in s 23A(8)(a) (see PARA 258): Sch 3 para 16 (as so added).

10 Estate Agents Act 1979 Sch 3 para 2(2)(c) (as added: see note 2). Such types of redress must include providing an apology or explanation, paying compensation and taking such other actions in the interests of the complainant as the ombudsman may specify: Sch 3 para 2(3) (as so added).

11 Estate Agents Act 1979 Sch 3 para 2(2)(d) (as added: see note 2).

12 'Scheme administrator', in relation to a redress scheme, means the person who administers the scheme: Estate Agents Act 1979 Sch 3 para 16 (as added: see note 2).

13 Estate Agents Act 1979 Sch 3 para 4 (as added: see note 2). As to the meaning of 'estate agency work' see PARA 240; for activities not amounting to 'estate agency work' for these purposes see PARA 241.

14 Estate Agents Act 1979 Sch 3 para 5 (as added: see note 2).

15 Where the OFT is proposing to refuse an application for approval it must give the applicant a notice stating that it is proposing to refuse the application, the grounds for the proposed refusal and that representations about the proposed refusal may be made within such period of not less than 30 days as is specified in the notice: Estate Agents Act 1979 Sch 3 para 7 (as added: see note 2). If the OFT decides to refuse an application for approval, it must give the applicant a notice stating its decision to refuse the application and the reasons for the decision: Sch 3 para 8 (as so added). As to the giving of notices see PARA 255 note 11.



16 Estate Agents Act 1979 Sch 3 para 9 (as added: see note 2). Notification must be given before the end of the period of 14 days beginning with the day on which the change is made: Sch 3 para 9 (as so added).

## UPDATE

### 239-282 Estate Agencies

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/10. ESTATE AGENCIES AND ACCOMMODATION AGENCIES/(1) ESTATE AGENCIES/(iv) Redress Schemes/260. Withdrawal of approval by Office of Fair Trading.

### 260. Withdrawal of approval by Office of Fair Trading.

The Office of Fair Trading<sup>1</sup> (the 'OFT') may withdraw approval of a redress scheme<sup>2</sup> which is for the time being approved by it<sup>3</sup>. Before withdrawing its approval the OFT must give the scheme administrator<sup>4</sup> a notice stating that it proposes to withdraw its approval<sup>5</sup> and the grounds for the proposed withdrawal<sup>6</sup>, and giving the administrator an opportunity to make representations on the matter<sup>7</sup>. The OFT must also notify the scheme administrator about its decision on a proposal to withdraw approval<sup>8</sup> and the reasons for its decision<sup>9</sup>.

1 As to the Office of Fair Trading see PARA 278.

2 As to the meaning of 'redress scheme' see PARA 258.

3 Estate Agents Act 1979 Sch 3 para 10 (Sch 3 added by the Consumers, Estate Agents and Redress Act 2007 Sch 6 paras 1, 3).

4 As to the meaning of 'scheme administrator' see PARA 259 note 12.

5 Estate Agents Act 1979 Sch 3 para 11(a) (as added: see note 3).

6 Estate Agents Act 1979 Sch 3 para 11(b) (as added: see note 3).

7 Estate Agents Act 1979 Sch 3 para 11(c) (as added: see note 3). As to the giving of notices see PARA 255 note 11. The notice must inform the scheme administrator that representations about the proposed withdrawal may be made within such period of not less than 30 days as is specified in the notice: Sch 3 para 11(c) (as so added).

8 Estate Agents Act 1979 Sch 3 para 12(a) (as added: see note 3).

9 Estate Agents Act 1979 Sch 3 para 12(b) (as added: see note 3). If the OFT decides to withdraw approval of a scheme the withdrawal has effect from such date as may be specified in the notice under Sch 3 para 12 (Sch 3 para 13(a) (as so added)) and the scheme administrator must give a copy of the notice under Sch 3 para 12 to every member of the scheme (Sch 3 para 13(b) (as so added)).

## UPDATE

### 239-282 Estate Agencies

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/10. ESTATE AGENCIES AND ACCOMMODATION AGENCIES/(1) ESTATE AGENCIES/(iv) Redress Schemes/261. Approval of redress schemes by Secretary of State.

### **261. Approval of redress schemes by Secretary of State.**

A redress scheme<sup>1</sup> is also 'approved' if it is administered by or on behalf of the Secretary of State and designated by him<sup>2</sup> as an approved redress scheme<sup>3</sup>. The Secretary of State may not designate a scheme as an approved redress scheme for these purposes unless he is satisfied that the scheme is one which could be approved<sup>4</sup> by the Office of Fair Trading<sup>5</sup>. The Secretary of State may also decide to revoke a designation, and where he makes such a decision he must give every member of the scheme a notice stating that he has so decided<sup>6</sup>, the reasons for his decision<sup>7</sup> and the date from which the revocation has effect<sup>8</sup>.

1 As to the meaning of 'redress scheme' see PARA 258.

2 Ie for the purposes of the Estate Agents Act 1979 s 23A (see PARAS 258, 262-263).

3 Estate Agents Act 1979 s 23A(8)(b)(ii) (s 23A, Sch 3 added by the Consumers, Estate Agents and Redress Act 2007 Sch 6 paras 1-3).

4 Ie in accordance with the Estate Agents Act 1979 Sch 3 paras 2-5 (see PARA 259).

5 Estate Agents Act 1979 s 23A(9) (as added: see note 3). As to the Office of Fair Trading see PARA 278.

6 Estate Agents Act 1979 Sch 3 para 14(a) (as added: see note 3).

7 Estate Agents Act 1979 Sch 3 para 14(b) (as added: see note 3).

8 Estate Agents Act 1979 Sch 3 para 14(c) (as added: see note 3).

### **UPDATE**

### **239-282 Estate Agencies**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/10. ESTATE AGENCIES AND ACCOMMODATION AGENCIES/(1) ESTATE AGENCIES/(iv) Redress Schemes/262. Compulsory scheme membership.

## 262. Compulsory scheme membership.

The Secretary of State may by order<sup>1</sup> require persons who engage in estate agency work<sup>2</sup> in relation to residential property<sup>3</sup> ('relevant estate agency work') to be members of an approved redress scheme<sup>4</sup> for dealing with complaints<sup>5</sup> in connection with that work<sup>6</sup>. Such an order may provide for the duty to be members of an approved scheme to apply only to specified descriptions of persons who engage in estate agency work<sup>7</sup> and in relation to any relevant estate agency work carried out by a person to whom the duty applies or only in relation to specified descriptions of work<sup>8</sup>, and for the duty not to apply in relation to complaints of any specified description<sup>9</sup>. Before making such an order the Secretary of State must be satisfied that all persons who are to be subject to the duty<sup>10</sup> will be eligible to join a suitable approved scheme before the duty applies to them<sup>11</sup>.

At the date at which this volume states the law no such orders had been made.

1 As to the making of orders generally see PARA 243 note 2. The power to make an order is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: Estate Agents Act 1979 s 23A(5) (s 23A added by the Consumers, Estate Agents and Redress Act 2007 Sch 6 paras 1, 2).

2 As to the meaning of 'estate agency work' see PARA 240; for activities not amounting to 'estate agency work' for these purposes see PARA 241. For these purposes the reference to persons who engage in estate agency work does not include a reference to persons who engage in that work in the course of their employment: Estate Agents Act 1979 s 23A(4) (as added: see note 1).

3 As to the meaning of 'residential property' see PARA 258.

4 As to the meaning of 'redress scheme' see PARA 258. As to the approval of redress schemes see PARAS 259-261.

5 As to the meaning of 'complaint' see PARA 258 note 1.

6 Estate Agents Act 1979 s 23A(1) (as added: see note 1).

7 Estate Agents Act 1979 s 23A(2)(a) (as added: see note 1).

8 Estate Agents Act 1979 s 23A(2)(a) (as added: see note 1). Such specified descriptions of work may be framed by reference to descriptions of residential property: s 23A(2)(a) (as so added).

9 Estate Agents Act 1979 s 23A(3) (as added: see note 1). Such specified descriptions of complaint may be framed by reference to a description of person making a complaint: s 23A(3) (as so added).

10 For this purpose the Secretary of State may disregard persons who cannot lawfully engage in the relevant estate agency work to which the duty applies: Estate Agents Act 1979 s 23A(6) (as added: see note 1).

11 Estate Agents Act 1979 s 23A(6) (as added: see note 1).

## UPDATE

### 239-282 Estate Agencies

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the

purposes of imposing civil sanctions): see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

## **262 Compulsory scheme membership**

TEXT AND NOTES--See now the Estate Agents (Redress Scheme) Order 2008, SI 2008/1712, which requires every person who engages in relevant estate agency work to be a member of an approved redress scheme.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/10. ESTATE AGENCIES AND ACCOMMODATION AGENCIES/(1) ESTATE AGENCIES/(iv) Redress Schemes/263. Voluntary scheme membership.

## **263. Voluntary scheme membership.**

Membership of an approved redress scheme<sup>1</sup> is also open<sup>2</sup> to persons who are not subject to the duty<sup>3</sup> to be members of such a scheme<sup>4</sup>. A scheme may also provide for the investigation and determination of any complaints<sup>5</sup> in relation to which the duty to be a member of a scheme does not apply if the members concerned have voluntarily accepted the jurisdiction of the scheme over those complaints<sup>6</sup>, and for the exclusion from investigation and determination under the scheme of any complaint in such cases or circumstances as may be specified in or determined under the scheme<sup>7</sup>.

1 As to the meaning of 'redress scheme' see PARA 258. As to the approval of redress schemes see PARAS 259-261.

2 Ie in addition to the requirement for compulsory membership imposed on specified persons by the Estate Agents Act 1979 s 23A; and PARA 262: nothing in s 23A prevents an approved redress scheme from providing for the matters referred to in this paragraph: s 23A(7) (s 23A added by the Consumers, Estate Agents and Redress Act 2007 Sch 6 paras 1, 2).

3 Ie under the Estate Agents Act 1979 s 23A (see PARA 262).

4 Estate Agents Act 1979 s 23A(7)(a) (as added: see note 2).

5 As to the meaning of 'complaint' see PARA 258 note 1.

6 Estate Agents Act 1979 s 23A(7)(b) (as added: see note 2).

7 Estate Agents Act 1979 s 23A(7)(c) (as added: see note 2).

## **UPDATE**

## **239-282 Estate Agencies**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/10. ESTATE AGENCIES AND ACCOMMODATION AGENCIES/(1) ESTATE AGENCIES/(iv) Redress Schemes/264. Penalty charge notices.

## 264. Penalty charge notices.

If an enforcement authority<sup>1</sup> other than the Office of Fair Trading<sup>2</sup> (the 'OFT') believes that a person has engaged (or is engaging) in estate agency work<sup>3</sup> in relation to residential property<sup>4</sup> in breach of the duty to be a member of an approved redress scheme<sup>5</sup>, it must notify the OFT<sup>6</sup>, and a duly authorised officer may give to the person in question a penalty charge notice<sup>7</sup> which:

- 205 (1) states his belief that that person has committed a breach of the duty<sup>8</sup>;
- 206 (2) gives such other particulars of the circumstances as may be necessary to give reasonable notice of the breach<sup>9</sup>;
- 207 (3) requires the person<sup>10</sup> either to pay a penalty charge specified in the notice (not exceeding £1,000<sup>11</sup>) or to give notice to the enforcement authority that he wishes to review the notice<sup>12</sup>;
- 208 (4) sets out the arrangements for the institution of proceedings, if necessary, for the recovery of the charge<sup>13</sup>;
- 209 (5) specifies the person to whom and the address at which the charge may be paid and the method or methods by which payment may be made<sup>14</sup>; and
- 210 (6) specifies the person to whom and the address at which a notice requesting a review may be sent (and to which any representations relating to the review may be addressed)<sup>15</sup>.

The Secretary of State may by regulations prescribe the form of penalty charge notices<sup>16</sup>. A penalty charge notice may not be given after the end of the period of six months beginning with the day (or in the case of a continuing breach the last day) on which the breach of duty was committed<sup>17</sup>. The authority may, if it considers that the penalty charge notice ought not to have been given, give the recipient a notice withdrawing the penalty charge notice<sup>18</sup>.

1 As to enforcement authorities see PARA 278.

2 As to the Office of Fair Trading see PARA 278.

3 As to the meaning of 'estate agency work' see PARA 240; for activities not amounting to 'estate agency work' for these purposes see PARA 241.

4 As to the meaning of 'residential property' see PARA 258.

5 Ie the duty imposed by an order under the Estate Agents Act 1979 s 23A(1) (see PARA 262). As to the meaning of 'redress scheme' see PARA 258. As to the approval of redress schemes see PARAS 259-261.

6 Estate Agents Act 1979 s 23B(4) (s 23B, Sch 4 added by the Consumers, Estate Agents and Redress Act 2007 Sch 6 paras 1, 2, 4).

7 Estate Agents Act 1979 s 23B(1) (as added: see note 6). As to the giving of penalty charge notices see PARA 255 note 11. The Secretary of State may by regulations prescribe the form of penalty charge notices and any other notice to be given under Sch 4 and the circumstances in which penalty charge notices may not be given: Sch 4 para 11(a), (b) (as so added). At the date at which this volume states the law no such regulations had been made. Any power to make regulations under Sch 4 is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: Sch 4 para 12 (as so added). As to the making of regulations generally see PARA 243 note 2.

8 Estate Agents Act 1979 s 23B(3), Sch 4 para 1(a) (as added: see note 6).

9 Estate Agents Act 1979 Sch 4 para 1(b) (as added: see note 6).

10 le within a period specified in the notice: Estate Agents Act 1979 Sch 4 para 1(c) (as added: see note 6). The specified period must not be less than 28 days beginning with the day after that on which the penalty charge notice was given, although the enforcement authority may extend the period for complying with the requirement either to pay the charge or ask for a review in any particular case if it considers it appropriate to do so: Sch 4 para 3 (as so added). As to reviews see PARA 265. As to enforcement authorities see PARA 278.

11 The penalty charge specified in the notice must be of such amount (not exceeding £1,000) as may be prescribed for the time being by regulations made by the Secretary of State: Estate Agents Act 1979 Sch 4 para 2 (as added: see note 6). At the date at which this volume states the law no such regulations had been made. See note 7.

12 Estate Agents Act 1979 Sch 4 para 1(c) (as added: see note 6).

13 Estate Agents Act 1979 Sch 4 para 1(d) (as added: see note 6). This involves stating the effect of Sch 4 para 8 (see PARA 266).

14 Estate Agents Act 1979 Sch 4 para 1(e) (as added: see note 6).

15 Estate Agents Act 1979 Sch 4 para 1(f) (as added: see note 6).

16 Estate Agents Act 1979 Sch 4 para 11(a) (as added: see note 6). At the date at which this volume states the law no such regulations had been made. See note 7.

17 Estate Agents Act 1979 s 23B(2) (as added: see note 6).

18 Estate Agents Act 1979 Sch 4 para 4 (as added: see note 6). A notice may also be withdrawn or quashed on review or appeal (see PARA 265). If a penalty charge notice is withdrawn or quashed the authority must repay any amount previously paid as a penalty charge in pursuance of the notice: Sch 4 para 7 (as so added).

## UPDATE

### 239-282 Estate Agencies

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

### 264 Penalty charge notices

NOTE 11--See now the Estate Agents (Redress Scheme) (Penalty Charge) Regulations 2008, SI 2008/1713, which specify an amount of £1,000.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/10. ESTATE AGENCIES AND ACCOMMODATION AGENCIES/(1) ESTATE AGENCIES/(iv) Redress Schemes/265. Reviews of, and appeals against, penalty charge notices.

### 265. Reviews of, and appeals against, penalty charge notices.

The recipient of a penalty charge notice<sup>1</sup> may give notice<sup>2</sup> to the enforcement authority<sup>3</sup> requesting a review, and the authority must consider any representations made by the recipient and all other circumstances of the case<sup>4</sup> and decide whether to confirm or withdraw

the notice<sup>5</sup>. The authority must withdraw the penalty charge notice if it is not satisfied that the recipient committed the breach of duty specified in the notice<sup>6</sup> and that in the circumstances of the case it was appropriate for a penalty charge notice to be given to the recipient<sup>7</sup>; if, however, the authority confirms the notice the recipient may appeal against the notice to a county court<sup>8</sup> on the ground that he did not commit the breach of duty specified in the notice<sup>9</sup>, that the notice was not given within the time allowed<sup>10</sup> or the procedural requirements<sup>11</sup> were not complied with<sup>12</sup>, or that in the circumstances of the case it was inappropriate for the notice to be given<sup>13</sup>, and the county court must either uphold the notice or quash it<sup>14</sup>.

If a penalty charge notice is withdrawn or quashed the authority must repay any amount previously paid as a penalty charge in pursuance of the notice<sup>15</sup>.

1 See PARA 264.

2 le within the period specified under the Estate Agents Act 1979 Sch 4 para 1(c) (see PARA 264) or that period as extended under Sch 4 para 3 (see PARA 264): Sch 4 para 5(1) (Sch 4 added by the Consumers, Estate Agents and Redress Act 2007 Sch 6 paras 1, 4). As to the form of notices see PARA 264 note 7. As to the giving of notices see PARA 255 note 11.

3 As to enforcement authorities see PARA 278.

4 Estate Agents Act 1979 Sch 4 para 5(1)(a) (as added: see note 2).

5 Estate Agents Act 1979 Sch 4 para 5(1)(b) (as added: see note 2). Notice of this decision must be given to the recipient: Sch 4 para 5(1)(c) (as so added). A notice under Sch 4 para 5(1)(c) which confirms the penalty charge notice must also state the effect of Sch 4 para 6(1)-(3) (see the text and notes 8-13) and Sch 4 para 8(1), (3) (see PARA 266). As to the giving of notices see PARA 255 note 11.

A notice may also be withdrawn at any time at the behest of the enforcement authority (see PARA 264).

6 Estate Agents Act 1979 Sch 4 para 5(3)(a) (as added: see note 2).

7 Estate Agents Act 1979 Sch 4 para 5(3)(c) (as added: see note 2). The authority must also be satisfied that the notice was given within the time allowed by s 23B(2) (see PARA 264) and complies with the other specified requirements imposed by or under Sch 4: Sch 4 para 5(3)(b) (as so added).

8 Estate Agents Act 1979 Sch 4 para 6(1) (as added: see note 2). An appeal against a penalty charge notice is by way of a rehearing: Sch 4 para 6(4) (as so added). Such an appeal must be brought within the period of 28 days beginning with the day after that on which the notice under Sch 4 para 5(1)(c) (see note 5) is given (Sch 4 para 6(1) (as so added)), although the county court may extend this period (Sch 4 para 6(2) (as so added)).

9 Estate Agents Act 1979 Sch 4 para 6(3)(a) (as added: see note 2).

10 le by the Estate Agents Act 1979 s 23B(2) (as added: see note 2) (see PARA 264).

11 le the requirements of the Estate Agents Act 1979 Sch 4.

12 Estate Agents Act 1979 Sch 4 para 6(3)(b) (as added: see note 2).

13 Estate Agents Act 1979 Sch 4 para 6(3)(c) (as added: see note 2).

14 Estate Agents Act 1979 Sch 4 para 6(4) (as added: see note 2).

15 Estate Agents Act 1979 Sch 4 para 7 (as added: see note 2).

## UPDATE

### 239-282 Estate Agencies

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory

Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/10. ESTATE AGENCIES AND ACCOMMODATION AGENCIES/(1) ESTATE AGENCIES/(iv) Redress Schemes/266. Recovery of the charge.

## **266. Recovery of the charge.**

Unless a penalty charge is paid<sup>1</sup> or the penalty charge notice has been withdrawn or quashed<sup>2</sup>, the amount of the charge is recoverable from the recipient of the notice as a debt owed to the enforcement authority<sup>3</sup>. Proceedings for the recovery of the charge may not be commenced before the end of the period within which the recipient of the notice may request a review<sup>4</sup>, and if within that period the recipient of the notice gives notice<sup>5</sup> to the authority that he wishes the authority to review the notice, proceedings may not be commenced before the end of the period within which the recipient may appeal to the county court against a confirmed notice<sup>6</sup> and, where the recipient appeals against the notice, before the end of the period of 28 days beginning with the day on which the appeal is withdrawn or determined<sup>7</sup>.

The Secretary of State may by regulations prescribe the method or methods by which penalty charges may be paid<sup>8</sup>.

1 Estate Agents Act 1979 Sch 4 para 8(1)(b) (Sch 4 added by the Consumers, Estate Agents and Redress Act 2007 Sch 6 paras 1, 4). As to penalty charges and penalty charge notices see PARA 264. In proceedings for recovery a certificate which purports to be signed by or on behalf of the person having responsibility for the financial affairs of the enforcement authority and states that payment of the penalty charge was or was not received by a date specified in the certificate is evidence of the facts stated: Sch 4 para 9 (as so added).

2 Estate Agents Act 1979 Sch 4 para 8(1)(a) (as added: see note 1). A penalty charge notice may be withdrawn at any time at the behest of the enforcement authority (see PARA 264) and may also be withdrawn or quashed on review or appeal (see PARA 265).

3 Estate Agents Act 1979 Sch 4 para 8(1) (as added: see note 1). As to enforcement authorities see PARA 278.

4 Estate Agents Act 1979 Sch 4 para 8(2) (as added: see note 1). This is the period referred to in Sch 4 para 5(1) (see PARA 265).

5 As to the form of notices see PARA 264 note 7. As to the giving of notices see PARA 255 note 11.

6 Estate Agents Act 1979 Sch 4 para 8(3)(a) (as added: see note 1). This is the period referred to in Sch 4 para 6(1) (see PARA 265).

7 Estate Agents Act 1979 Sch 4 para 8(3)(b) (as added: see note 1).

8 Estate Agents Act 1979 Sch 4 para 11(c) (as added: see note 1). As to the making of regulations generally see PARAS 243 note 2, 264 note 7. At the date at which this volume states the law no such regulations had been made.

## **UPDATE**

### **239-282 Estate Agencies**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements



mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/10. ESTATE AGENCIES AND ACCOMMODATION AGENCIES/(1) ESTATE AGENCIES/(v) Prohibition of Unfit Persons/267. Power to make prohibition orders.

## **(v) Prohibition of Unfit Persons**

### **267. Power to make prohibition orders.**

Where the Office of Fair Trading<sup>1</sup> (the 'OFT') is satisfied that a person is unfit to carry on estate agency work<sup>2</sup>, either generally or in relation to a specific activity, it may make an order prohibiting that person from carrying on estate agency work at all or from engaging in a particular aspect of such work<sup>3</sup>. Matters specifically relating to the business of estate agency work<sup>4</sup>, and the OFT must specify in the order, as the grounds for the order, those matters<sup>5</sup> in relation to which it is satisfied and on which, accordingly, it relies to give it power to make the order<sup>6</sup>. In determining whether to make an order the OFT may also take account of whether, in the course of estate agency work or any other business activity, the person in question has engaged in any practice involving a breach of a duty owed by virtue of any enactment, contract or rule of law which is material to his fitness to carry on estate agency work<sup>7</sup>.

Failure to comply with a prohibition order is an offence<sup>8</sup>.

1 As to the Office of Fair Trading see PARA 278.

2 As to the meaning of 'estate agency work' see PARA 240; for activities not amounting to 'estate agency work' for these purposes see PARA 241.

3 Estate Agents Act 1979 s 3(2) (s 3(2), (4), (5), (8) amended by the Enterprise Act 2002 s 278(1), Sch 25 para 9(1), (2)(b)-(d)). The OFT may, if it considers it appropriate, limit the scope of a prohibition imposed by an order to a particular part of or area within the United Kingdom: Estate Agents Act 1979 s 3(5) (as so amended). The matters to be included in a prohibition order and the procedure to be followed in making the order are specified: see s 5, Sch 2 Pt I (amended by the Enterprise Act 2002 s 278(1), Sch 25 para 9(1), (4), (16); and (as from 1 October 2008) by the Consumers, Estate Agents and Redress Act 2007 ss 55(1), (4), 64, Sch 8) (see also the Consumers, Estate Agents and Redress Act 2007 (Commencement No 4) Order 2008, SI 2008/905).

Where a prohibition order has the effect of prohibiting a person from holding clients' money the order may contain provision appointing another person as trustee in place of the person to whom the order relates to hold and deal with clients' money held by that person when the order comes into effect, and requiring the expenses and such reasonable remuneration of the new trustee as may be specified in the order to be paid by the person to whom the order relates or, if the order so provides, out of the clients' money: Estate Agents Act 1979 s 13(4). Nothing in s 13(4) affects the power conferred by the Trustee Act 1925 s 41 (see **TRUSTS** vol 48 (2007 Reissue) PARA 849) to appoint a new trustee to hold clients' money: Estate Agents Act 1979 s 13(4). As to the meaning of 'clients' money' see PARA 251.

Provision is made for the revocation and variation of prohibition orders (see PARA 274) and for the bringing of appeals against such orders (see PARA 275).

4 See the Estate Agents Act 1979 s 3(1)(a)-(d), Sch 1; and PARAS 268-272.

5 Ie the matters falling within the Estate Agents Act 1979 s 3(1)(a)-(d) (see PARAS 268-272).

6 Estate Agents Act 1979 s 3(4) (as amended: see note 3).

7 Estate Agents Act 1979 s 3(2) (as amended: see note 3).

8 See the Estate Agents Act 1979 s 3(8) (as amended: see note 3) (a person who fails without reasonable excuse to comply with an order of the OFT under s 3 is liable on conviction on indictment or on summary conviction to a fine which on summary conviction may not exceed the statutory maximum). As to offences by bodies corporate see PARA 242. As to defences see PARA 243 note 7. As to the statutory maximum see PARA 203 note 3.

## UPDATE

### 239-282 Estate Agencies

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/10. ESTATE AGENCIES AND ACCOMMODATION AGENCIES/(1) ESTATE AGENCIES/(v) Prohibition of Unfit Persons/268. Criminal convictions.

### 268. Criminal convictions.

The Office of Fair Trading<sup>1</sup> may make an order prohibiting a person from carrying on estate agency work<sup>2</sup> or from engaging in a particular aspect of such work<sup>3</sup> if it is satisfied that that person has been convicted of (or, as from 1 October 2008, has committed<sup>4</sup>):

- 211 (1) an offence involving fraud or other dishonesty or violence<sup>5</sup>;
- 212 (2) an offence under the Estate Agents Act 1979 (other than an offence involving engaging in estate agency work without having attained the appropriate standards of competence or while bankrupt)<sup>6</sup>;
- 213 (3) an offence involving property misdescription or false or misleading trade descriptions or statements<sup>7</sup>;
- 214 (4) an offence involving the unlawful harassment of debtors<sup>8</sup>;
- 215 (5) the offence of pretending to be a licensed conveyancer or recognised body<sup>9</sup>;
- 216 (6) an offence involving acting as a company director while disqualified<sup>10</sup>;
- 217 (7) a specified offence under consumer protection legislation<sup>11</sup>;
- 218 (8) a specified data protection offence under repealed legislation<sup>12</sup>;
- 219 (9) a specified offence under the Financial Services Act 1986<sup>13</sup>; or
- 220 (10) an offence involving the sending of malicious communications<sup>14</sup>.

Spent convictions are disregarded for these purposes<sup>15</sup>.

1 As to the Office of Fair Trading see PARA 278.

2 As to the meaning of 'estate agency work' see PARA 240; for activities not amounting to 'estate agency work' for these purposes see PARA 241.

3 For the power of the Office of Fair Trading to make prohibition orders generally see the Estate Agents Act 1979 s 3(2); and PARA 267.

4 Estate Agents Act 1979 s 3(1) (amended by the Enterprise Act 2002 s 278(1), Sch 25 para 9(1), (2)). As from 1 October 2008 the Estate Agents Act 1979 s 3(1)(a) (see the text and notes 5-7) is further amended by the Consumers, Estate Agents and Redress Act 2007 s 55(1), (2) (and see the Consumers, Estate Agents and Redress Act 2007 (Commencement No 4) Order 2008, SI 2008/905), so that the reference to a person having been convicted of one of the offences referred to in the text is replaced by a reference to his having committed that offence.

5 Estate Agents Act 1979 s 3(1)(a)(i). 'Conviction' for the purposes of s 3(1)(a)(i) includes a conviction before 4 April 1979 (ie the date on which the Estate Agents Act 1979 received Royal Assent) and also includes a conviction outside the United Kingdom (*Antonelli v Secretary of State for Trade and Industry* [1998] QB 948, [1998] 1 All ER 997, CA).

6 Estate Agents Act 1979 s 3(1)(a)(ii). For the offence of engaging in estate agency work without having attained the appropriate standards of competence see s 22(3); and PARA 243. For the offence of engaging in estate agency work while bankrupt see s 23(4); and PARA 244. Offences under s 10(6) (repealed) are also excluded: s 3(1)(a)(ii).

7 Estate Agents Act 1979 s 3(1)(a)(iii); Estate Agents (Specified Offences) (No 2) Order 1991, SI 1991/1091, art 2, Schedule (amended by SI 1992/2833). For the offence of property misdescription see the Property Misdescriptions Act 1991 s 1(1), (2); and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 791. The specified offences for these purposes involving false or misleading trade descriptions or statements are offences under the Trade Descriptions Act 1968 ss 1(1), 13, 14(1)(b), 29(1) (see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARAS 475, 494-495, 511).

The Estate Agents (Specified Offences) (No 2) Order 1991, SI 1991/1091, is made pursuant to the Estate Agents Act 1979 s 3(6), which provides that such an order must be made by statutory instrument, must be laid before Parliament after being made and will cease to have effect (without prejudice to anything previously done in reliance on the order) after the expiry of the period of 28 days beginning with the date on which it was made unless within that period it has been approved by a resolution of each House of Parliament. In reckoning for this purpose any period of 28 days, no account may be taken of any period during which Parliament is dissolved or prorogued or during which both Houses are adjourned for more than four days: s 3(7). As to the making of orders and regulations generally see PARA 243 note 2.

8 Estate Agents (Specified Offences) (No 2) Order 1991, SI 1991/1091, Schedule. For this offence see the Administration of Justice Act 1970 s 40(1)(a); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 838.

9 Estate Agents (Specified Offences) (No 2) Order 1991, SI 1991/1091, Schedule. For this offence see the Administration of Justice Act 1985 s 35; and **LEGAL PROFESSIONS** vol 65 (2008) PARA 598.

10 Estate Agents (Specified Offences) (No 2) Order 1991, SI 1991/1091, Schedule. The specified offences for these purposes are offences under the Company Directors Disqualification Act 1986 ss 11(1), 12(2), 13 (see **COMPANIES** vol 14 (2009) PARA 493, **COMPANIES** vol 15 (2009) PARAS 1590-1591, 1614) and corresponding Northern Irish legislation.

11 Estate Agents (Specified Offences) (No 2) Order 1991, SI 1991/1091, Schedule. The specified offences for these purposes are offences under the Consumer Credit Act 1974 ss 7, 39(1)-(3), 46(1), 154, 165(1), 167(2) (see **CONSUMER CREDIT** vol 9(1) (Reissue) PARAS 120-124, 145, 150, 281, 311-312), the Consumer Protection Act 1987 ss 20(1), (2), 32(1), (2)(b) (see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARAS 560, 702, 714) and corresponding Northern Irish legislation.

12 Estate Agents (Specified Offences) (No 2) Order 1991, SI 1991/1091, Schedule. The specified offences for these purposes are offences under the Data Protection Act 1984 ss 5, 6(6), 10(9), 15, all of which have been repealed. For the modern law of data protection see the Data Protection Act 1998; and **CONFIDENCE AND DATA PROTECTION**.

13 Estate Agents (Specified Offences) (No 2) Order 1991, SI 1991/1091, Schedule. The specified offences for these purposes are offences under the Financial Services Act 1986 ss 4, 57, 59(5), 105(10), 111(1), 130, 133(1)(b), 199(6), 200(1)-(3), Sch 6 para 5(3), all of which have been repealed. For the modern law in this area see the Financial Services and Markets Act 2000; and **FINANCIAL SERVICES AND INSTITUTIONS**.

14 Estate Agents (Specified Offences) (No 2) Order 1991, SI 1991/1091, Schedule. The specified offence for this purposes is an offence under the Malicious Communications Act 1988 s 1(1)(a)(i), (ii) (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 767) and the corresponding Northern Irish offence.

15 Estate Agents Act 1979 Sch 1 para 1 (substituted by the Consumers, Estate Agents and Redress Act 2007 s 55(1), (5) and providing, as from 1 October 2008, that a person is not to be treated for the purposes of s 3(1)(a) as having committed an offence if he has been convicted of that offence and that conviction is to be treated

as spent for the purposes of the Rehabilitation of Offenders Act 1974 or any corresponding Northern Irish enactment). See also the Consumers, Estate Agents and Redress Act 2007 (Commencement No 4) Order 2008, SI 2008/905. Until 1 October 2008 the Estate Agents Act 1979 Sch 1 para 1 provides that a conviction which is to be treated as spent for the purposes of the Rehabilitation of Offenders Act 1974 or any corresponding Northern Irish enactment is disregarded for the purposes of the Estate Agents Act 1979 s 3(1)(a): Sch 1 para 1 (as originally enacted).

## UPDATE

### 239-282 Estate Agencies

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/10. ESTATE AGENCIES AND ACCOMMODATION AGENCIES/(1) ESTATE AGENCIES/(v) Prohibition of Unfit Persons/269. Discrimination.

### 269. Discrimination.

The Office of Fair Trading<sup>1</sup> may make an order prohibiting a person from carrying on estate agency work<sup>2</sup> or from engaging in a particular aspect of such work<sup>3</sup> if it is satisfied that that person has committed discrimination on grounds of race or gender<sup>4</sup> in the course of estate agency work<sup>5</sup>. A person is deemed to have committed discrimination for these purposes if:

- 221 (1) a finding of discrimination has been made against him<sup>6</sup> and the finding has become final<sup>7</sup>;
- 222 (2) he has been given an unlawful act notice<sup>8</sup> and no appeal<sup>9</sup> is pending or can be brought<sup>10</sup>;
- 223 (3) he is for the time being subject to a relevant injunction or order<sup>11</sup>; or
- 224 (4) a county court has determined<sup>12</sup> that he has committed an act which is unlawful under the statutory restrictions on discriminatory advertising<sup>13</sup>, giving instructions to discriminate<sup>14</sup> or inducing discrimination by threat or reward<sup>15</sup>, and that no appeal<sup>16</sup> is pending or can be brought<sup>17</sup>,

and the finding, notice, injunction or order related or relates to discrimination on grounds of race or gender in the fields other than employment<sup>18</sup>.

These provisions are subject to a statutory period of limitation<sup>19</sup>.

1 As to the Office of Fair Trading see PARA 278.

2 As to the meaning of 'estate agency work' see PARA 240; for activities not amounting to 'estate agency work' for these purposes see PARA 241.

3 For the power of the Office of Fair Trading to make prohibition orders generally see the Estate Agents Act 1979 s 3(2); and PARA 267.

4     Ie under the Sex Discrimination Act 1975, the Race Relations Act 1976, the Equality Act 2006 or corresponding Northern Irish legislation: see the Estate Agents Act 1979 Sch 1 paras 2-6; and the text and notes 5-19.

5     Estate Agents Act 1979 s 3(1)(b) (s 3(1) amended by the Enterprise Act 2002 s 278(1), Sch 25 para 9(1), (2)). It is unlawful to discriminate against any person, on the grounds of race, gender or disability, in the disposal or management of premises: see the Sex Discrimination Act 1975 ss 30, 31; the Race Relations Act 1976 ss 21, 22; and the Disability Discrimination Act 1995 ss 22, 23; and **DISCRIMINATION** vol 13 (2007 Reissue) PARAS 384, 463-464, 600, 602.

6     Ie in proceedings under the Sex Discrimination Act 1975 s 66 (see **DISCRIMINATION** vol 13 (2007 Reissue) PARA 415) or the Race Relations Act 1976 s 57 (see **DISCRIMINATION** vol 13 (2007 Reissue) PARA 500).

7     Estate Agents Act 1979 s 3(1), Sch 1 para 2(a), (e).

8     Ie under the Equality Act 2006 s 21 (see **DISCRIMINATION** vol 13 (2007 Reissue) PARA 328).

9     Ie under the Equality Act 2006 s 21 (see **DISCRIMINATION** vol 13 (2007 Reissue) PARA 328).

10    Estate Agents Act 1979 Sch 1 para 2(b) (Sch 1 para 2(b)-(d) substituted by the Equality Act 2006 s 40, Sch 3 paras 36, 38(1), (2)). Prior to the commencement of this amendment (ie 1 October 2007: see the Equality Act 2006 (Commencement No 3 and Savings) Order 2007, SI 2007/2603) reference was here made to a person having had served on him a non-discrimination notice under the Sex Discrimination Act 1975 s 67 (repealed as from that date) (see **DISCRIMINATION** vol 13 (2007 Reissue) PARA 413) or the Race Relations Act 1976 s 58 (repealed as from that date) (see **DISCRIMINATION** vol 13 (2007 Reissue) PARA 498) and that notice having become final: see the Estate Agents Act 1979 Sch 1 para 2(b), (f) (as originally enacted).

11    Estate Agents Act 1979 Sch 1 para 2(c) (as substituted: see note 10). The injunction or order referred to in the text is an injunction or order under the Equality Act 2006 s 24 (unlawful acts) or s 25 (unlawful advertising, pressure, etc) (see **DISCRIMINATION** vol 13 (2007 Reissue) PARAS 331-332): Estate Agents Act 1979 Sch 1 para 2(c) (as so substituted). Prior to 1 October 2007 (see note 10) the injunction or order referred to in the text was an injunction or order granted against the person in proceedings under the Sex Discrimination Act 1975 s 71 (repealed as from that date) (persistent discrimination) or s 72(4) (repealed as from that date) (enforcement of ss 38-40) (see **DISCRIMINATION** vol 13 (2007 Reissue) PARA 413) or the Race Relations Act 1976 s 62 (repealed as from that date) (persistent discrimination) or s 63(4) (repealed as from that date) (enforcement of ss 29-31) (see **DISCRIMINATION** vol 13 (2007 Reissue) PARA 498): see the Estate Agents Act 1979 Sch 1 para 2(c), (g) (as originally enacted).

12    Ie in accordance with the Equality Act 2006 s 25 (see **DISCRIMINATION** vol 13 (2007 Reissue) PARA 332).

13    Ie under the Sex Discrimination Act 1975 s 38 (see **DISCRIMINATION** vol 13 (2007 Reissue) PARA 388) or the Race Relations Act 1976 s 29 (see **DISCRIMINATION** vol 13 (2007 Reissue) PARA 473).

14    Ie under the Sex Discrimination Act 1975 s 39 (see **DISCRIMINATION** vol 13 (2007 Reissue) PARA 389) or the Race Relations Act 1976 s 30 (see **DISCRIMINATION** vol 13 (2007 Reissue) PARA 474).

15    Ie under the Sex Discrimination Act 1975 s 40 (see **DISCRIMINATION** vol 13 (2007 Reissue) PARA 390) or the Race Relations Act 1976 s 31 (see **DISCRIMINATION** vol 13 (2007 Reissue) PARA 475).

16    Ie under the Equality Act 2006 s 25 (see **DISCRIMINATION** vol 13 (2007 Reissue) PARA 332) (disregarding an appeal out of time).

17    Estate Agents Act 1979 Sch 1 para 2(d) (as substituted: see note 10). Prior to 1 October 2007 (see note 10) this provision referred to a finding, on an application under the Sex Discrimination Act 1975 s 72(2)(a) (repealed as from that date) (see **DISCRIMINATION** vol 13 (2007 Reissue) PARA 413) or the Race Relations Act 1976 s 63(2)(a) (repealed as from that date) (see **DISCRIMINATION** vol 13 (2007 Reissue) PARA 498), that a contravention of the relevant provisions has occurred, and that finding having become final: see the Estate Agents Act 1979 Sch 1 para 2(d), (h) (as originally enacted).

18    Estate Agents Act 1979 Sch 1 para 2. 'Discrimination in the fields other than employment' is discrimination falling within the Sex Discrimination Act 1975 Pt III (ss 22-36) (see **DISCRIMINATION** vol 13 (2007 Reissue) PARA 378 et seq) or the Race Relations Act 1976 Pt III (ss 17-27) (see **DISCRIMINATION** vol 13 (2007 Reissue) PARA 460 et seq): Estate Agents Act 1979 Sch 1 para 2.

19    See the Estate Agents Act 1979 Sch 1 para 3, which provides that after the expiry of the period of five years beginning on the day on which any such finding or notice as is referred to in Sch 1 para 2 (see the text and notes 1-18) became final, no person is treated for the purposes of s 3(1)(b) as having committed discrimination by reason only of that finding or notice.

**UPDATE****239-282 Estate Agencies**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/10. ESTATE AGENCIES AND ACCOMMODATION AGENCIES/(1) ESTATE AGENCIES/(v) Prohibition of Unfit Persons/270. Dealings with clients and clients' money.

**270. Dealings with clients and clients' money.**

The Office of Fair Trading<sup>1</sup> (the 'OFT') may make an order prohibiting a person from carrying on estate agency work<sup>2</sup> or from engaging in a particular aspect of such work<sup>3</sup> if it is satisfied that that person has failed to comply with any statutory obligation imposed on him<sup>4</sup> with regard to:

- 225 (1) accounting for interest on clients' money<sup>5</sup>;
- 226 (2) the giving of information to clients with respect to remuneration, their prospective liabilities under the agency contract or agreed contractual variations<sup>6</sup>; or
- 227 (3) notifying clients with regard to any personal interest he has in a proposed or intended transaction<sup>7</sup>.

As from a day to be appointed the OFT may also make such an order if it is satisfied that that person has failed to comply with the statutory obligation imposed on him with regard to the keeping of permanent records<sup>8</sup>.

1 As to the Office of Fair Trading see PARA 278.

2 As to the meaning of 'estate agency work' see PARA 240; for activities not amounting to 'estate agency work' for these purposes see PARA 241.

3 For the power of the Office of Fair Trading to make prohibition orders generally see the Estate Agents Act 1979 s 3(2); and PARA 267.

4 Estate Agents Act 1979 s 3(1)(c) (s 3(1) amended by the Enterprise Act 2002 s 278(1), Sch 25 para 9(1), (2)). For these purposes, and for the purposes of the provisions described in PARAS 271-272, anything done by a person in the course of his employment is treated as done by his employer as well as by him, whether or not it was done with the employer's knowledge or approval, unless the employer shows that he took such steps as were reasonably practicable to prevent the employee from doing that act, or from doing in the course of his employment acts of that description: Estate Agents Act 1979 s 3(3)(a) (s 3(3) amended by the Consumers, Estate Agents and Redress Act 2007 s 63(1), Sch 7 para 1, as from 1 October 2008 (see the Consumers, Estate Agents and Redress Act 2007 (Commencement No 4) Order 2008, SI 2008/905), consequentially upon amendments effected by the Consumers, Estate Agents and Redress Act 2007 and recorded in PARA 272).

Anything done by a person as agent for another person with the authority (whether express or implied, and whether precedent or subsequent) of that person is treated as done by that other person as well as by him: Estate Agents Act 1979 s 3(3)(b). Anything done by a business associate of a person is treated as done by that

person as well, unless he can show that the act was done without his connivance or consent: s 3(3)(c). As to the meanings of 'associate' and 'business associate' see PARA 242.

5 le the obligation imposed under the Estate Agents Act 1979 s 15 (see PARA 254). As to the meaning of 'clients' money' see PARA 251.

6 le the obligations imposed under the Estate Agents Act 1979 s 18 (see PARAS 245-247).

7 le the obligations imposed under the Estate Agents Act 1979 s 21 (see PARA 249).

8 Estate Agents Act 1979 s 3(1)(c) (prospectively amended by the Consumers, Estate Agents and Redress Act 2007 s 54(2)). At the date at which this volume states the law no day had been appointed for the coming into force of this amendment. The statutory obligation referred to in the text is that imposed by the Estate Agents Act 1979 s 21A (see PARA 250).

## UPDATE

### 239-282 Estate Agencies

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/10. ESTATE AGENCIES AND ACCOMMODATION AGENCIES/(1) ESTATE AGENCIES/(v) Prohibition of Unfit Persons/271. Undesirable practices.

### 271. Undesirable practices.

The Office of Fair Trading<sup>1</sup> may make an order prohibiting a person from carrying on estate agency work<sup>2</sup> or from engaging in a particular aspect of such work<sup>3</sup> if it is satisfied that that person<sup>4</sup> has engaged in an undesirable practice, that is:

- 228 (1) a failure to make disclosure of a personal interest<sup>5</sup> promptly<sup>6</sup> and in writing<sup>7</sup>;
- 229 (2) a failure to disclose to his client<sup>8</sup> promptly and in writing that he himself has, or is seeking to acquire, a beneficial interest in the land or in the proceeds of sale of any interest in the land or he knows that any connected person<sup>9</sup> has, or is seeking to acquire, a beneficial interest in the land or in the proceeds of sale of any interest in the land<sup>10</sup>;
- 230 (3) discrimination against a prospective purchaser<sup>11</sup> by an estate agent on the grounds that that purchaser will not be, or is unlikely to be, accepting services<sup>12</sup>;
- 231 (4) a failure, following the making of an offer<sup>13</sup>, to forward<sup>14</sup> to a client promptly and in writing at all stages before contracts for the disposal of the interest in the land have been exchanged an accurate list of services<sup>15</sup>;
- 232 (5) making misrepresentations concerning the existence of an offer<sup>16</sup> or a prospective purchaser<sup>17</sup>; or
- 233 (6) a failure to forward<sup>18</sup> to a client, promptly and in writing, accurate details<sup>19</sup> of any offer the agent has received from a prospective purchaser in respect of an interest in the land<sup>20</sup>.

1 As to the Office of Fair Trading see PARA 278.

2 As to the meaning of 'estate agency work' see PARA 240; for activities not amounting to 'estate agency work' for these purposes see PARA 241. For these purposes 'estate agent' means any person who in the course of a business (including one in which he is employed) engages in estate agency work and includes cases where he is negotiating on his own behalf: Estate Agents (Undesirable Practices) (No 2) Order 1991, SI 1991/1032, art 1(2).

3 For the power of the Office of Fair Trading to make prohibition orders generally see the Estate Agents Act 1979 s 3(2); and PARA 267.

4 As to the liability of employees, agents and associates see PARA 270 note 4.

5 As required by the Estate Agents Act 1979 s 21(1) (see PARA 249). 'Interest in land' means any of the interests referred to in s 2 (see PARA 240 note 3) and references to an 'interest in the land' are references to the particular interest in land of which the estate agent is engaged to secure the disposal or acquisition: Estate Agents (Undesirable Practices) (No 2) Order 1991, SI 1991/1032, art 1(2).

6 'Promptly' means within as short a period as is reasonably practicable in the circumstances, from the moment when what is to be done can reasonably be done: Estate Agents (Undesirable Practices) (No 2) Order 1991, SI 1991/1032, art 1(2).

7 Estate Agents Act 1979 s 3(1)(d); Estate Agents (Undesirable Practices) (No 2) Order 1991, SI 1991/1032, art 2(a), Sch 1 para 1. The Estate Agents (Undesirable Practices) (No 2) Order 1991, SI 1991/1032, is made pursuant to the Estate Agents Act 1979 s 3(6), which provides that such an order must be made by statutory instrument, must be laid before Parliament after being made and will cease to have effect (without prejudice to anything previously done in reliance on the order) after the expiry of the period of 28 days beginning with the date on which it was made unless within that period it has been approved by a resolution of each House of Parliament. As to the making of orders and regulations generally see PARA 243 note 2.

8 As to the person on whose behalf the estate agent acts: Estate Agents (Undesirable Practices) (No 2) Order 1991, SI 1991/1032, art 1(2).

9 'Connected person' in relation to an estate agent means his employer or principal, any employee or agent of his or any associate of his or of his employer, principal, employee or agent: Estate Agents (Undesirable Practices) (No 2) Order 1991, SI 1991/1032, art 1(2). As to the meaning of 'associate' see PARA 242.

10 Estate Agents (Undesirable Practices) (No 2) Order 1991, SI 1991/1032, Sch 1 para 2.

11 'Purchaser' means a person to whom an interest in land is transferred or in whose favour it is created: Estate Agents (Undesirable Practices) (No 2) Order 1991, SI 1991/1032, art 1(2). It is unlawful to discriminate against any person, on the grounds of race, gender or disability, in the disposal or management of premises: see the Sex Discrimination Act 1975 ss 30, 31; the Race Relations Act 1976 ss 21, 22; and the Disability Discrimination Act 1995 ss 22, 23; and **DISCRIMINATION** vol 13 (2007 Reissue) PARAS 384, 463-464, 600, 602.

12 Estate Agents (Undesirable Practices) (No 2) Order 1991, SI 1991/1032, art 2(b), Sch 2 para 1. 'Services' means any service for consideration provided, or to be provided, to a prospective purchaser by an estate agent or a connected person, or (in a case where the estate agent or connected person would derive a financial benefit from the provision of the service) by another person, and which is such as would ordinarily be made available to a prospective purchaser in connection with his acquisition of an interest in land or his use or enjoyment of it (including the provision to that purchaser of banking and insurance services and financial assistance and securing the disposal for that purchaser of an interest in land if that disposal is one which has to be made in order for him to be able to make the acquisition he is proposing or is one which is a result of that acquisition): art 1(2). 'Financial benefit' includes commission and any performance related bonus: art 1(2).

13 As to where the estate agent has introduced a prospective purchaser to his client and that purchaser has made an offer: Estate Agents (Undesirable Practices) (No 2) Order 1991, SI 1991/1032, Sch 2 para 2. 'Offer' includes a conditional offer: Sch 2 para 2.

14 'Forward' means despatch to the client by hand, post or fax at the address or to the number given by the client to the agent, which despatch may be made by the person by whom or which the service is being, or is to be, provided: Estate Agents (Undesirable Practices) (No 2) Order 1991, SI 1991/1032, Sch 2 para 2.

15 Estate Agents (Undesirable Practices) (No 2) Order 1991, SI 1991/1032, Sch 2 para 2. This is an undesirable practice for these purposes provided that an application from the prospective purchaser for services has been received by the agent or a connected person or (in a case where the agent or a connected person would derive a financial benefit from the provision of the service) by another person, the agent knows that such application has been received and that it is an application for services, being services in connection



with the prospective purchaser's acquisition of the interest in the land or his use or enjoyment of it, or with his disposal of an interest in land which he has to make in order to make that acquisition or which is the result of that acquisition, and that application has not been refused: Sch 2 para 2.

16 'Offer' includes any conditional offer, but does not include offers of a description which the client has indicated in writing to the agent need not be forwarded to him: Estate Agents (Undesirable Practices) (No 2) Order 1991, SI 1991/1032, art 2(c), Sch 3 para 3(b).

17 Estate Agents (Undesirable Practices) (No 2) Order 1991, SI 1991/1032, Sch 3 para 1. It is an undesirable practice for these purposes if the agent knowingly or recklessly, and orally or in writing, makes any misrepresentation as to the existence of, or details relating to, any offer for the interest in the land (Sch 3 para 1(a)) or as to the existence or status of any prospective purchaser of an interest in the land (Sch 3 para 1(b)). A misrepresentation is 'recklessly' made if it is made regardless of whether it is true or false, whether or not the agent had reasons for believing that it might be false: Sch 3 para 3(a). Sch 3 para 1(a) does not affect the right of an auctioneer to bid at an auction in accordance with the Sale of Land by Auction Act 1867 s 6 (see **AUCTION** vol 2(3) (Reissue) PARA 242) (Estate Agents (Undesirable Practices) (No 2) Order 1991, SI 1991/1032, Sch 3 para 3(c)), and in Sch 3 para 1(b) the 'status of any prospective purchaser' includes the financial standing of that purchaser and his ability to exchange contracts expeditiously or in Scotland conclude a contract expeditiously (Sch 3 para 3(d)).

18 This means despatch to the client by hand, post or fax at the address or to the number given by the client to the agent: Estate Agents (Undesirable Practices) (No 2) Order 1991, SI 1991/1032, Sch 3 para 3(e).

19 ie excluding details of a description which the client has indicated in writing he does not wish to receive: Estate Agents (Undesirable Practices) (No 2) Order 1991, SI 1991/1032, Sch 3 para 2.

20 Estate Agents (Undesirable Practices) (No 2) Order 1991, SI 1991/1032, Sch 3 para 2.

## UPDATE

### 239-282 Estate Agencies

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/10. ESTATE AGENCIES AND ACCOMMODATION AGENCIES/(1) ESTATE AGENCIES/(v) Prohibition of Unfit Persons/272. Breach of compliance requirements.

### 272. Breach of compliance requirements.

As from 1 October 2008<sup>1</sup> the Office of Fair Trading<sup>2</sup> (the 'OFT') may make an order prohibiting a person from carrying on estate agency work<sup>3</sup> or from engaging in a particular aspect of such work<sup>4</sup> if it is satisfied that that person<sup>5</sup> has:

- 234 (1) failed to comply with an enforcement order<sup>6</sup> which was made against him in relation to estate agency work<sup>7</sup>;
- 235 (2) failed to comply with an undertaking accepted from him<sup>8</sup> in relation to an enforcement order in connection with estate agency work<sup>9</sup>;
- 236 (3) engaged in estate agency work in relation to residential property<sup>10</sup> in breach of the duty<sup>11</sup> to be a member of an approved redress scheme<sup>12</sup>; or
- 237 (4) failed to comply with a requirement<sup>13</sup> to furnish information to the OFT<sup>14</sup>.

- 1 The Estate Agents Act 1979 s 3(1)(ba), (bb), (ca), (cb) (see the text and notes 2-14) are added by the Consumers, Estate Agents and Redress Act 2007 ss 53(2), 55(1), (3), 58(2), as from 1 October 2008 (see the Consumers, Estate Agents and Redress Act 2007 (Commencement No 4) Order 2008, SI 2008/905).
- 2 As to the Office of Fair Trading see PARA 278.
- 3 As to the meaning of 'estate agency work' see PARA 240; for activities not amounting to 'estate agency work' for these purposes see PARA 241.
- 4 For the power of the Office of Fair Trading to make prohibition orders generally see the Estate Agents Act 1979 s 3(2); and PARA 267.
- 5 As to the liability of employees, agents and associates see PARA 270 note 4.
- 6 Ie an order under the Enterprise Act 2002 s 217 (see **COMPETITION** vol 18 (2009) PARA 346).
- 7 Estate Agents Act 1979 s 3(1)(bb) (as added: see note 1).
- 8 Ie under the Enterprise Act 2002 s 217, s 218 or s 219 (see **COMPETITION** vol 18 (2009) PARAS 346, 347).
- 9 Estate Agents Act 1979 s 3(1)(ba) (as added: see note 1).
- 10 As to the meaning of 'residential property' in connection with redress schemes see PARA 258.
- 11 Ie the duty imposed by an order under the Estate Agents Act 1979 s 23A(1) (see PARA 258).
- 12 Estate Agents Act 1979 s 3(1)(ca) (as added: see note 1). As to approved redress schemes see PARAS 258-266.
- 13 Ie any requirement imposed by the Estate Agents Act 1979 s 9(1) (see PARA 277) or s 11(1A)(b) (see PARA 279).
- 14 Estate Agents Act 1979 s 3(1)(cb) (as added: see note 1).

## UPDATE

### 239-282 Estate Agencies

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/10. ESTATE AGENCIES AND ACCOMMODATION AGENCIES/(1) ESTATE AGENCIES/(v) Prohibition of Unfit Persons/273. Warning orders.

### 273. Warning orders.

The Office of Fair Trading<sup>1</sup> (the 'OFT') is empowered to issue warning orders to persons in respect of whom it is minded to make prohibition orders<sup>2</sup>.

Until 1 October 2008<sup>3</sup> the OFT may give a person a warning order where it is satisfied that, in the course of estate agency work<sup>4</sup>, he has failed to comply with the specified statutory

obligations relating to dealings with clients and clients' money<sup>5</sup> or has engaged in an undesirable practice<sup>6</sup>, and that if he repeats that failure or continues in that practice the OFT would consider him unfit<sup>7</sup> to carry on estate agency work and would make a prohibition order<sup>8</sup> against him<sup>9</sup>.

As from that day<sup>10</sup> the OFT may give a person a warning order<sup>11</sup> where it is satisfied that, in the course of estate agency work he has:

- 238 (1) committed a specified offence<sup>12</sup>;
- 239 (2) committed discrimination<sup>13</sup>;
- 240 (3) failed to comply with the specified statutory obligations relating to dealings with clients and clients' money<sup>14</sup>;
- 241 (4) acted in relation to residential property<sup>15</sup> in breach of the duty<sup>16</sup> to be a member of an approved redress scheme<sup>17</sup>;
- 242 (5) failed to comply with a requirement<sup>18</sup> to furnish information to the OFT<sup>19</sup>;
- 243 (6) failed to comply with an enforcement order<sup>20</sup> which was made against him in relation to estate agency work<sup>21</sup>;
- 244 (7) failed to comply with an undertaking accepted from him<sup>22</sup> in relation to such an order<sup>23</sup>; or
- 245 (8) engaged in an undesirable practice<sup>24</sup>,

and that were he to engage again in any such conduct<sup>25</sup>, to fail again to comply with the specified undertaking or order by engaging in the same or similar conduct<sup>26</sup>, or to engage again in the specified undesirable practice<sup>27</sup>, the OFT would consider him unfit and proceed to make a prohibition order<sup>28</sup>.

A warning order must state whether, in the opinion of the OFT, any further failure or conduct<sup>29</sup> would render the person to whom the order is addressed unfit to carry on estate agency work generally or estate agency work of a description specified in the order<sup>30</sup>. Any further failure or conduct on the part of a person to whom a warning order is addressed<sup>31</sup> is treated as conclusive evidence that that person is unfit to carry on estate agency work as stated in the order, and the OFT may proceed to make a prohibition order accordingly<sup>32</sup>.

The OFT is required to establish and maintain a register of every warning order made by it<sup>33</sup>.

1 As to the Office of Fair Trading see PARA 278.

2 See the Estate Agents Act 1979 s 4; and the text and notes 3-32. The matters to be included in a warning order and the procedure to be followed in making the order are specified: see s 5, Sch 2 Pt I (amended by the Enterprise Act 2002 s 278(1), Sch 25 para 9(1), (4), (16); and (as from 1 October 2008) by the Consumers, Estate Agents and Redress Act 2007 ss 55(1), (4), 64, Sch 8) (see also the Consumers, Estate Agents and Redress Act 2007 (Commencement No 4) Order 2008, SI 2008/905). Provision is made for the revocation and variation of warning orders (see PARA 274) and for the bringing of appeals (see PARA 275).

3 As from 1 October 2008 (see the Consumers, Estate Agents and Redress Act 2007 (Commencement No 4) Order 2008, SI 2008/905) the Estate Agents Act 1979 s 4(1) is substituted, s 4(1A)-(1C), (4) are added, and s 4(2), (3) are amended, by the Consumers, Estate Agents and Redress Act 2007 s 56.

4 As to the meaning of 'estate agency work' see PARA 240; for activities not amounting to 'estate agency work' for these purposes see PARA 241.

5 Ie any such obligation as is referred to in the Estate Agents Act 1979 s 3(1)(c) (see PARA 270).

6 Ie any practice referred to in the Estate Agents Act 1979 s 3(1)(d) (see PARA 271).

7 As from 1 October 2008 'unfit' means unfit as mentioned in the Estate Agents Act 1979 s 3(2) (see PARA 267): s 4(4) (as added: see note 3).

8 Ie an order under the Estate Agents Act 1979 s 3(2) (see PARA 267).

9 Estate Agents Act 1979 s 4(1) (s 4(1)-(3) amended by the Enterprise Act 2002 s 278(1), Sch 25 para 9(1), (3)). For the matters to be specified in the order and the procedure to be followed in making the order see the Estate Agents Act 1979 s 5, Sch 2 Pt I; and PARA 267.

10 See note 3.

11 The order must notify the person that the OFT is satisfied of the matter in question: Estate Agents Act 1979 s 4(1) (as substituted: see note 3).

12 Ie engaged in conduct falling within the Estate Agents Act 1979 s 3(1)(a) (see PARA 268): s 4(1A)(a) (as added: see note 3).

13 Ie engaged in conduct falling within the Estate Agents Act 1979 s 3(1)(b) (see PARA 269): s 4(1A)(a) (as added: see note 3).

14 Ie failed to comply with any such obligation as is referred to in the Estate Agents Act 1979 s 3(1)(c) (see PARA 270): s 4(1A)(a) (as added: see note 3).

15 As to the meaning of 'residential property' in connection with redress schemes see PARA 258.

16 Ie the duty imposed by an order under the Estate Agents Act 1979 s 23A(1) (see PARA 258).

17 Ie engaged in conduct falling within the Estate Agents Act 1979 s 3(1)(ca) (see PARA 272): s 4(1A)(a) (as added: see note 3).

18 Ie any requirement imposed by the Estate Agents Act 1979 s 9(1) (see PARA 277) or s 11(1A)(b) (see PARA 279).

19 Ie engaged in conduct falling within the Estate Agents Act 1979 s 3(1)(cb) (see PARA 272): s 4(1A)(a) (as added: see note 3).

20 Ie an order under the Enterprise Act 2002 s 217 (see **COMPETITION** vol 18 (2009) PARA 346).

21 Ie engaged in conduct constituting a failure to comply with an enforcement order mentioned in the Estate Agents Act 1979 s 3(1)(bb) (see PARA 272): s 4(1B)(a)(ii) (as added: see note 3).

22 Ie under the Enterprise Act 2002 s 217, s 218 or s 219 (see **COMPETITION** vol 18 (2009) PARAS 346, 347).

23 Ie engaged in conduct constituting a failure to comply with an undertaking mentioned in the Estate Agents Act 1979 s 3(1)(ba) (see PARA 272): s 4(1B)(a)(i) (as added: see note 3).

24 See note 6.

25 Ie in relation to the matters referred to in the text and notes 12-19.

26 Ie in relation to the matters referred to in the text and notes 20-23.

27 See note 6.

28 Estate Agents Act 1979 s 4(1A)(b), (1B)(b), (1C)(b) (as added: see note 3). As from 1 October 2008 (see note 3) 'prohibition order' means an order under s 3 (see PARA 268): s 4(4) (as so added).

29 Until 1 October 2008 (see note 3) this refers to a further failure to comply with a statutory obligation under the Estate Agents Act 1979 s 3(1)(c) or, as the case may be, continuation of the undesirable practice specified in the order; as from that day it refers to any further conduct as mentioned in s 4(1A)(b) or (1B)(b) (see the text and notes 24-27) or engaging again in the undesirable practice specified in the order, as the case may be: s 4(2), (3) (as amended: see note 3).

30 Estate Agents Act 1979 s 4(2) (as amended: see note 3).

31 See note 29.

32 Estate Agents Act 1979 s 4(3) (as amended: see note 3).

33 See PARA 276.

## UPDATE

## 239-282 Estate Agencies

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/10. ESTATE AGENCIES AND ACCOMMODATION AGENCIES/(1) ESTATE AGENCIES/(v) Prohibition of Unfit Persons/274. Variation and revocation of orders.

### 274. Variation and revocation of orders.

The Office of Fair Trading<sup>1</sup> (the 'OFT') may revoke or vary a prohibition order<sup>2</sup> or a warning order<sup>3</sup> on the application<sup>4</sup> of the person<sup>5</sup> in respect of whom the order was made<sup>6</sup>. The OFT may refuse an application for the revocation or variation of a prohibition order if it considers that the applicant remains unfit to carry on any estate agency work<sup>7</sup> at all or, as the case may be, estate agency work of the description which is prohibited by the order<sup>8</sup>, and may refuse an application for the revocation or variation of a warning order if it considers that the applicant may repeat the behaviour<sup>9</sup> that occasioned the order<sup>10</sup>. It may, however, vary an order even though it considers that the applicant remains unfit to carry on any estate agency work<sup>11</sup> if the order could, without detriment to the public, be varied in favour of the applicant<sup>12</sup>.

The OFT is required to establish and maintain a register of every decision made by it on an application for variation or revocation of an order<sup>13</sup>.

1 As to the Office of Fair Trading see PARA 278.

2 Ie an order under the Estate Agents Act 1979 s 3 (see PARAS 267-272).

3 Ie an order under the Estate Agents Act 1979 s 4 (see PARA 273).

4 An application for variation or revocation must state the reasons why the applicant considers that the order should be revoked or varied, must (in the case of an application for a variation) indicate the variation which the applicant seeks, and must be accompanied by a fee of £2,500: Estate Agents Act 1979 s 6(2); Estate Agents (Fees) Regulations 1982, SI 1982/637, reg 2. The power to make regulations under the Estate Agents Act 1979 s 33(1) prescribing fees is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: s 33(2).

5 As to the liability of employees, agents and associates in respect of prohibition orders see PARA 270 note 4.

6 Estate Agents Act 1979 s 6(1) (s 6(1), (3)-(6), Sch 2 Pt II amended by the Enterprise Act 2002 s 278(1), Sch 25 para 9(1), (5), (16)). The procedure to be followed in making an application for revocation or variation is specified: see s 6(6), Sch 2 Pt II (as so amended). If the OFT decides to accede to such an application it must give notice in writing of its decision to the applicant and, upon the giving of that notice, the revocation or, as the case may be, the variation specified in the application must take effect: s 6(3) (as so amended). As to the giving of notices see PARA 255 note 11.

7 As to the meaning of 'estate agency work' see PARA 240; for activities not amounting to 'estate agency work' for these purposes see PARA 241.

8 Estate Agents Act 1979 s 6(4)(a) (as so amended).

9 Until 1 October 2008 this refers to a further failure to comply with a statutory obligation under the Estate Agents Act 1979 s 3(1)(c) (see PARA 270) or, as the case may be, a further engagement in the undesirable practice specified in the order; as from that day it refers to any further conduct as mentioned in s 4(1A)(b) or (1B)(b) (see PARA 273) or engaging again in the undesirable practice specified in the order, as the case may be: s 6(4)(b), (7) (s 6(4)(b) as amended (see note 6); s 6(4)(b) further amended, s 6(7) repealed, by the Consumers, Estate Agents and Redress Act 2007 ss 63(1), 64, Sch 7 para 2, Sch 8, as from 1 October 2008 (see the Consumers, Estate Agents and Redress Act 2007 (Commencement No 4) Order 2008, SI 2008/905)).

10 Estate Agents Act 1979 s 6(4)(b) (as amended: see notes 6, 9).

11 Ie even if it cannot accede to an application for variation or revocation because it considers that the applicant remains unfit to carry on any estate agency work at all in a particular part of or area within the United Kingdom or remains unfit to carry on estate agency work of a particular description (either throughout the United Kingdom or in a particular part of or area within it), or, as the case may be, remains likely to fail to comply with a relevant statutory obligation or to engage in a particular practice: Estate Agents Act 1979 s 6(5) (a) (as amended: see note 6).

12 Estate Agents Act 1979 s 6(5)(b) (as amended: see note 6).

13 See PARA 276.

## UPDATE

### 239-282 Estate Agencies

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/10. ESTATE AGENCIES AND ACCOMMODATION AGENCIES/(1) ESTATE AGENCIES/(v) Prohibition of Unfit Persons/275. Appeals against prohibition orders and warning orders.

### 275. Appeals against prohibition orders and warning orders.

A person who is notified<sup>1</sup> that the Office of Fair Trading<sup>2</sup> (the 'OFT') has decided to make a prohibition<sup>3</sup> or warning<sup>4</sup> order in respect of him, to refuse an application for the revocation or variation of such an order<sup>5</sup>, or to make a limited variation of such an order pursuant to such an application<sup>6</sup>, may appeal against the decision to the Secretary of State<sup>7</sup>, and if the appellant is dissatisfied in point of law with a decision of the Secretary of State on such an appeal he may appeal against that decision to the High Court<sup>8</sup>.

1 Ie under the Estate Agents Act 1979 Sch 2 para 9 (s 7(1), Sch 2 para 9 amended by the Enterprise Act 2002 s 278(1), Sch 25 para 9(1), (6), (16)).

2 As to the Office of Fair Trading see PARA 278.

3 Ie an order under the Estate Agents Act 1979 s 3 (see PARAS 267-272).

4 Ie an order under the Estate Agents Act 1979 s 4 (see PARA 273).

5 Ie under the Estate Agents Act 1979 s 6(4) (see PARA 274).

6 le under the Estate Agents Act 1979 s 6(5) (see PARA 274).

7 Estate Agents Act 1979 s 7(1) (as amended: see note 1). On such an appeal the Secretary of State may give such directions for disposing of the appeal as he thinks just, including a direction for the payment of costs or expenses by any party to the appeal: s 7(2). As to the period within which and the manner in which appeals may be brought see the Estate Agents (Appeals) Regulations 1981, SI 1981/1518 (amended by SI 2003/1400). The regulations provide for: (1) the commencement of the appeal including the notice of appeal, the OFT's reply, the appellant's rejoinder, the amendment of grounds before directives for hearing and the OFT's reply to amendment; (2) the disposal of the appeal both with and without a hearing; and (3) general provisions including the person appointed to hear the appeal, evidence, production, disclosure and confidentiality of documents, costs and extensions of time. These regulations are made under the Estate Agents Act 1979 s 7(3), which requires the Secretary of State to make provision by regulations with respect to appeals under s 7(1) above as to the period within which and the manner in which such appeals are to be brought, as to the persons by whom such appeals are to be heard on behalf of the Secretary of State, as to the manner in which such appeals are to be conducted, for taxing or otherwise settling any costs or expenses directed to be paid under s 7(2) and for the enforcement of any such direction, and as to any other matter connected with such appeals. Regulations are made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: s 7(3). As to the making of regulations generally see PARA 243 note 2.

8 Estate Agents Act 1979 s 7(4). No appeal to the Court of Appeal may be brought from a decision under s 7(4) except with the leave of that court or of the court or judge from whose decision the appeal is brought: s 7(5).

## UPDATE

### 239-282 Estate Agencies

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

### 275 Appeals against prohibition orders and warning orders

TEXT AND NOTES 7, 8--An appeal is now made to the First-tier Tribunal, and so any further appeal is made to the Upper Tribunal (see generally **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 13A.1): Estate Agents Act 1979 s 7(1) (s 7(1), (2) amended, s 7(3)-(6) repealed, and SI 1981/1518 revoked by SI 2009/1836).

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/10. ESTATE AGENCIES AND ACCOMMODATION AGENCIES/(1) ESTATE AGENCIES/(v) Prohibition of Unfit Persons/276. Register of orders and decisions.

### 276. Register of orders and decisions.

The Office of Fair Trading<sup>1</sup> (the 'OFT') must establish and maintain a register on which are entered particulars of every prohibition order<sup>2</sup> and warning order<sup>3</sup> and of its decision on any application for revocation or variation<sup>4</sup> of such an order<sup>5</sup>. Provision is made for the rectification of this register by the OFT<sup>6</sup> and for the removal of out-of-date particulars<sup>7</sup>. Any person may inspect the register and take copies, and obtain a certified copy of any entry<sup>8</sup>.

<sup>1</sup> As to the Office of Fair Trading see PARA 278.

2 le an order under the Estate Agents Act 1979 s 3 (see PARAS 267-272).

3 le an order under the Estate Agents Act 1979 s 4 (see PARA 273).

4 le under the Estate Agents Act 1979 s 6 (see PARA 274).

5 Estate Agents Act 1979 s 8(1) (s 8(1), (3)-(6), Sch 2 Pt II amended by the Enterprise Act 2002 s 278(1), Sch 25 para 9(1), (7), (16)). The particulars must include the terms of the order and of any variation of it and the date on which the order or variation came into operation or is expected to come into operation or, if an appeal against the decision is pending and the order or variation has in consequence not come into operation, a statement to that effect: Estate Agents Act 1979 s 8(2).

6 The OFT may, of its own motion or on the application of any person aggrieved, rectify the register by the addition, variation or removal of any particulars: Estate Agents Act 1979 s 8(3) (as amended: see note 5). The provisions of Sch 2 Pt II (as so amended) have effect in relation to an application for rectification: s 8(3) (as so amended).

7 If it comes to the attention of the OFT that any order of which particulars appear in the register is no longer in operation, the OFT must remove those particulars from the register: Estate Agents Act 1979 s 8(4) (as amended: see note 5).

8 Any person is entitled, on payment of the fee prescribed in the Estate Agents (Fees) Regulations 1982, SI 1982/637, reg 3, to inspect the register during such office hours as may be specified by a general notice made by the OFT (Estate Agents Act 1979 s 8(5)(a) (as amended: see note 5)) and to take copies of any entry, or to obtain from the OFT a copy, certified by it to be correct, of any entry in the register (s 8(5)(b) (as so amended)). A certificate given by the OFT under s 8(5)(b) is conclusive evidence of the fact that, on the date on which the certificate was given, the particulars contained in the copy to which the certificate relates were entered on the register; and particulars of any matters required to be entered on the register which are so entered are evidence of those matters and are presumed, unless the contrary is proved, to be correct: s 8(6) (as so amended).

## UPDATE

### 239-282 Estate Agencies

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/10. ESTATE AGENCIES AND ACCOMMODATION AGENCIES/(1) ESTATE AGENCIES/(v) Prohibition of Unfit Persons/277. Provision and disclosure of information.

### 277. Provision and disclosure of information.

The Office of Fair Trading<sup>1</sup> (the 'OFT') may by notice<sup>2</sup> require any person<sup>3</sup> to provide specified information<sup>4</sup> in order to assist it in determining whether to make a prohibition order<sup>5</sup> or a warning order<sup>6</sup> and in the exercise of any of its supplementary functions relating to such orders<sup>7</sup>. It is an offence<sup>8</sup>:

246 (1) to make, in furnishing any information in compliance with such a notice, any statement which the person making the statement knows to be false in a material



- particular or recklessly to make any statement which is false in a material particular<sup>9</sup>; or
- 247 (2) with intent to deceive, to produce in compliance with such a notice a document which is false in a material particular<sup>10</sup>,

and until 1 October 2008<sup>11</sup> it is also an offence to refuse or wilfully neglect to comply with such a notice<sup>12</sup>.

As from 1 October 2008<sup>13</sup> the court<sup>14</sup> may, where on an application<sup>15</sup> it appears to it that a person<sup>16</sup> has failed to do something that he is required to do by virtue of these provisions<sup>17</sup>, make an order requiring the defaulter to do the thing that it appears he failed to do within such period as may be specified in the order<sup>18</sup> or otherwise to take such steps to remedy the consequences of the failure as may be so specified<sup>19</sup> and, if the defaulter is a body corporate, a partnership or an unincorporated association, requiring any officer<sup>20</sup> who is (wholly or partly) responsible for the failure to meet such costs of the application as are specified in the order<sup>21</sup>.

1 As to the Office of Fair Trading see PARA 278.

2 As to the giving of notices see PARA 255 note 11. A notice may specify the way in which and the time within which it is to be complied with and, in the case of a notice requiring the production of documents, the facilities to be afforded for making extracts, or taking copies of, the documents; and may be varied or revoked by a subsequent notice: Estate Agents Act 1979 s 9(2).

3 Particular duties are imposed on the Commission for Equality and Human Rights to furnish to the OFT such information relating to any finding, notice, injunction or order falling within the Estate Agents Act 1979 Sch 1 para 2 (see PARA 269) as is in its possession and appears to the Commission to be relevant to the functions of the OFT under the Estate Agents Act 1979: see s 9(6) (s 9(1), (6) amended by the Enterprise Act 2002 s 278(1), Sch 25 para 9(1), (8); Estate Agents Act 1979 s 9(6) amended by the Equality Act 2006 ss 40, 91, Sch 3 paras 36, 37).

4 Ie to furnish to the OFT such information as may be specified or described in the notice or to produce to it any documents so specified or described: Estate Agents Act 1979 s 9(1) (as amended: see note 3). This does not require a person who has acted as counsel or solicitor for any person to disclose any privileged communication made by or to him in that capacity: s 9(3).

5 Ie an order under the Estate Agents Act 1979 s 3 (see PARAS 267-272).

6 Ie an order under the Estate Agents Act 1979 s 4 (see PARA 273).

7 Estate Agents Act 1979 s 9(1)(a), (b) (as amended: see note 3). The 'supplementary functions' referred to in the text are the OFT's functions under s 5 (supplementary powers as to prohibition orders and warning orders) (see PARA 273), s 6 (revocation and variation of prohibition orders and warning orders) (see PARA 274), s 8 (register of orders) (see PARA 276) and s 13(4) (orders prohibiting dealing with clients' money) (see PARA 267 note 3).

8 A person guilty of this offence is liable on conviction or indictment or summary conviction to a fine which, on summary conviction, must not exceed the statutory maximum: Estate Agents Act 1979 s 9(4). As to offences by bodies corporate see PARA 242. As to defences see PARA 243 note 7. As to the statutory maximum see PARA 203 note 3.

9 Estate Agents Act 1979 s 9(4)(b). As from 1 October 2008 s 9(4)(a) is repealed, s 9(4)(b) is amended, and s 11A is added, by the Consumers, Estate Agents and Redress Act 2007 s 58(1), (3), Sch 8 (see the Consumers, Estate Agents and Redress Act 2007 (Commencement No 4) Order 2008, SI 2008/905). The amendment of the Estate Agents Act 1979 s 9(4)(b) is consequential on the repeal of s 9(4)(a) and does not affect the meaning of head (1) in the text.

10 Estate Agents Act 1979 s 9(4)(c).

11 See note 9.

12 Estate Agents Act 1979 s 9(4)(a) (repealed as from 1 October 2008: see note 9).

13 See note 9.

- 14   le the High Court or a county court: Estate Agents Act 1979 s 11A(4) (as added: see note 9).
- 15   le an application made by a duly authorised officer of an enforcement authority: Estate Agents Act 1979 s 11A(1) (as added: see note 9). As to enforcement authorities see PARA 278.
- 16   le the 'defaulter': Estate Agents Act 1979 s 11A(1) (as added: see note 9).
- 17   le the provisions of the Estate Agents Act 1979 s 9(1) (see the text and notes 1-7).
- 18   Estate Agents Act 1979 s 11A(2)(a) (as added: see note 9).
- 19   Estate Agents Act 1979 s 11A(2)(b) (as added: see note 9).
- 20   In relation to a body corporate 'officer' means a person holding a position of director, manager or secretary of the body or any similar position; and in relation to a partnership or an unincorporated association, it means a member of the partnership or association: s 11A(4) (as added: see note 9). 'Director' means, in relation to a body corporate whose affairs are managed by its members, a member of the body: s 11A(5) (as so added).
- 21   Estate Agents Act 1979 s 11A(3) (as added: see note 9).

## UPDATE

### 239-282 Estate Agencies

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/10. ESTATE AGENCIES AND ACCOMMODATION AGENCIES/(1) ESTATE AGENCIES/(vi) Enforcement and Compliance/278. Enforcement authorities.

## (vi) Enforcement and Compliance

### 278. Enforcement authorities.

The Office of Fair Trading<sup>1</sup> (the 'OFT') and local weights and measures authorities<sup>2</sup> are the 'enforcement authorities' for the purposes of the Estate Agents Act 1979, and are under a duty to enforce the Act's provisions<sup>3</sup>.

It is the duty of the OFT generally to superintend the working and enforcement of the Act<sup>4</sup> and, where necessary or expedient, itself to take steps to enforce it<sup>5</sup>. It is also the OFT's duty, so far as appears to it to be practicable and having regard both to the national interest and the interests of persons engaged in estate agency work<sup>6</sup> and of consumers, to keep under review and from time to time advise the Secretary of State about social and commercial developments in the United Kingdom and elsewhere relating to the carrying on of estate agency work and related activities<sup>7</sup> and about the working and enforcement of the Act<sup>8</sup>, and to arrange for the dissemination, in such form and manner as it considers appropriate, of such information and advice as it may appear to it expedient to give the public in the United Kingdom about the operation of the Act<sup>9</sup>.

1 As to the Office of Fair Trading see the Enterprise Act 2002 Pt 1 (ss 1-11); and **COMPETITION** vol 18 (2009) PARAS 6-8.

2 As to the local weights and measures authorities see **WEIGHTS AND MEASURES** vol 50 (2005 Reissue) PARAS 20-35. Every local weights and measures authority must, whenever the OFT requires, report to it in such form and with such particulars as the OFT requires on the exercise of its functions under the Estate Agents Act 1979: s 26(4) (ss 25, 26(1), (3), (4) amended by the Enterprise Act 2002 s 278(1), Sch 25 para 9(1), (12), (13)).

3 Estate Agents Act 1979 s 26(1)(a), (b) (as amended: see note 2). Sections 25, 26 do not authorise the institution of proceedings in Scotland: s 26(3).

4 Estate Agents Act 1979 s 25(1)(a) (as amended: see note 2).

5 Estate Agents Act 1979 s 25(1)(b) (as amended: see note 2). See note 3.

6 As to the meaning of 'estate agency work' see PARA 240; for activities not amounting to 'estate agency work' for these purposes see PARA 241.

7 Estate Agents Act 1979 s 25(2)(a) (as amended: see note 2).

8 Estate Agents Act 1979 s 25(2)(b) (as amended: see note 2).

9 Estate Agents Act 1979 s 25(3) (as amended: see note 2).

## UPDATE

### 239-282 Estate Agencies

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/10. ESTATE AGENCIES AND ACCOMMODATION AGENCIES/(1) ESTATE AGENCIES/(vi) Enforcement and Compliance/279. Powers of entry and inspection.

### 279. Powers of entry and inspection.

A duly authorised officer of an enforcement authority<sup>1</sup> may enter any premises<sup>2</sup> and require any person employed there<sup>3</sup> to produce any books or documents relating to the business<sup>4</sup> or any person having control of electronic information<sup>5</sup> to provide a usable hard copy version of that information<sup>6</sup>, and may take copies of, or of any entry in, the books or documents so provided<sup>7</sup>. A duly authorised officer who has reasonable cause to suspect that an offence has been committed under the Act may exercise these powers in order to ascertain whether such an offence has indeed been committed<sup>8</sup>; as from 1 October 2008<sup>9</sup> a duly authorised officer who has reasonable cause to suspect that a person has failed to comply with any statutory obligation imposed on him with regard to accounting for interest on clients' money<sup>10</sup>, the giving of information to clients with respect to remuneration, their prospective liabilities under the agency contract or agreed contractual variations<sup>11</sup>, notifying clients with regard to any personal interest he has in a proposed or intended transaction<sup>12</sup> or with regard to the keeping of permanent records<sup>13</sup>, or that a person has engaged in an undesirable practice<sup>14</sup>, may also

exercise these powers in order to ascertain whether the person has failed to comply with the specified obligation or engaged in the undesirable practice<sup>15</sup>.

A duly authorised officer may also seize and detain any books or documents which he has reason to believe may be required as evidence in proceedings for an offence under the Estate Agents Act 1979<sup>16</sup>; as from 1 October 2008<sup>17</sup> this power is also exercisable with respect to proceedings<sup>18</sup> relating to an allegation that such an offence has been committed<sup>19</sup> or an allegation that a person has failed to comply with a statutory obligation imposed on him with regard to accounting for interest on clients' money<sup>20</sup>, the giving of information to clients with respect to remuneration, their prospective liabilities under the agency contract or agreed contractual variations<sup>21</sup>, notifying clients with regard to any personal interest he has in a proposed or intended transaction<sup>22</sup> or with regard to the keeping of permanent records<sup>23</sup>, or has engaged in an undesirable practice<sup>24</sup>.

These powers may be exercised at all reasonable hours and on production, if required, of the officer's credentials<sup>25</sup>. A justice of the peace may, in certain circumstances, authorise forced entry<sup>26</sup>.

1 As to the enforcement authorities see PARA 278. The Secretary of State may by regulations provide that, in cases specified in the regulations, an officer of a local weights and measures authority is not to be taken to be duly authorised for these purposes unless he is authorised by the Office of Fair Trading: Estate Agents Act 1979 s 11(6) (amended by the Enterprise Act 2002 s 278(1), Sch 25 para 9(1), (9)(a)). Such regulations must be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: Estate Agents Act 1979 s 11(7). Certain cases involving banks are specified for this purpose: see the Estate Agents (Entry and Inspection) Regulations 1981, SI 1981/1519, reg 2. As to the making of regulations generally see PARA 243 note 2.

2 As from 1 October 2008 this means premises other than premises used only as a dwelling: Estate Agents Act 1979 s 11(1)(a), (1A)(a) (s 11(1) substituted, ss 11(1A)-(1F), 11A added, by the Consumers, Estate Agents and Redress Act 2007 ss 57(1), (2), 58(1), as from that date (see the Consumers, Estate Agents and Redress Act 2007 (Commencement No 4) Order 2008, SI 2008/905)). An officer entering premises may take such other persons and equipment with him as he thinks necessary: Estate Agents Act 1979 s 11(5).

3 I.e. any person carrying on, or employed in connection with, the business in question: Estate Agents Act 1979 s 11(1)(b)(i), (1A)(b)(i) (substituted and added as from 1 October 2008: see note 2).

4 Estate Agents Act 1979 s 11(1)(b)(i), (1A)(b)(i) (substituted and added as from 1 October 2008: see note 2). As from 1 October 2008 the High Court or a county court may, where on an application made by a duly authorised officer of an enforcement authority it appears to it that a person (the 'defaulter') has failed to do something that he is required to do by virtue of s 11(1A)(b), make an order requiring the defaulter to do the thing that it appears he failed to do within such period as may be specified in the order (s 11A(1), (2)(a), (4) (as so added)) or otherwise to take such steps to remedy the consequences of the failure as may be so specified (s 11A(2)(b) (as so added)) and, if the defaulter is a body corporate, a partnership or an unincorporated association, requiring any officer who is (wholly or partly) responsible for the failure to meet such costs of the application as are specified in the order (s 11A(3) (as so added)). In relation to a body corporate 'officer' means a person holding a position of director, manager or secretary of the body or any similar position; and in relation to a partnership or an unincorporated association, it means a member of the partnership or association: s 11A(4) (as so added). 'Director' means, in relation to a body corporate whose affairs are managed by its members, a member of the body: s 11A(5) (as so added).

5 Until 1 October 2008 this means any person having control of any information relating to a business recorded otherwise than in a legible form; as from that day it means any person having control of any information relating to a business which is stored in any electronic form: Estate Agents Act 1979 s 11(1)(b)(ii), (1A)(b)(ii) (as substituted and added: see note 2). See also note 4.

6 Estate Agents Act 1979 s 11(1)(b)(ii), (1A)(b)(ii) (as substituted and added: see note 2). Until 1 October 2008 this means providing a document containing a legible reproduction of the whole or any part of the information recorded otherwise than in a legible form; as from that day it means producing the information in a form in which it can be taken away and in which it is visible and legible (or from which it can readily be produced in a visible and legible form): s 11(1)(b)(ii), (1A)(b)(ii) (as so substituted and added). See also note 4.

7 Estate Agents Act 1979 s 11(1)(b), (1A)(c) (as substituted and added: see note 2). An officer seizing books or documents in exercise of his powers under s 11 must not do so without informing the person from whom he seizes them: s 11(2). If and so long as any books or documents which have been seized under s 11 are not

required as evidence in connection with proceedings which have been begun for an offence, the enforcement authority must afford to the person to whom the books or documents belong and to any person authorised by him in writing reasonable facilities to inspect them and to take copies of or make extracts from them: s 11(3). Until 1 October 2008 a duly authorised officer may, for the purpose of exercising his powers of seizure, but only if and to the extent that it is reasonably necessary for securing that the provisions of the Estate Agents Act 1979 are duly observed, require any person having authority to do so to break open any container and, if that person does not comply, break it open himself: s 11(1)(d) (as originally enacted).

As from 1 October 2008 if it is not reasonably practicable to exercise any power under s 11(1A)(c) to take a copy of, or of any entry in, a book or document, an officer may seize and detain the book or document for the purpose of inspecting it (or any entry in it): s 11(1C) (as so added). A book or document which is seized in exercise of the power under s 11(1C) must be returned to the person from whom it was seized unless an officer has reason to believe that the book or document may be required as evidence in any proceedings mentioned in s 11(1B) (see the text and notes 16-24): s 11(1D) (as so added).

Nothing in s 11 requires a person who has acted as counsel or solicitor for any person to produce a document containing a privileged communication made by or to him in that capacity or authorises the seizing of any such document in his possession: s 11(8).

8 Estate Agents Act 1979 s 11(1)(a) (as substituted: see note 2).

9 See note 2.

10 Ie the obligation imposed under the Estate Agents Act 1979 s 15 (see PARA 254). As to the meaning of 'clients' money' see PARA 251.

11 Ie the obligations imposed by the Estate Agents Act 1979 s 18 (see PARAS 245-247).

12 Ie the obligations imposed by the Estate Agents Act 1979 s 21 (see PARA 249).

13 Ie the obligations imposed by the Estate Agents Act 1979 s 21A (see PARA 250).

14 Ie a practice mentioned in the Estate Agents Act 1979 s 3(1)(d) (see PARA 271).

15 Estate Agents Act 1979 s 11(1)(b), (c) (as substituted: see note 2).

16 Estate Agents Act 1979 s 11(1)(c), (1B)(a) (prospectively substituted and added: see note 2). As to seizure and detention see also note 7.

17 See note 2.

18 Ie proceedings under any of the Estate Agents Act 1979 s 3 (prohibition orders: see PARA 267 et seq), s 4 (warning orders: see PARA 273), s 6 (variation and revocation of prohibition and warning orders: see PARA 274) or s 7 (appeals concerning prohibition and warning orders: see PARA 275): s 11(1B)(b) (as added: see note 2).

19 Estate Agents Act 1979 s 11(1B)(b)(i) (as added: see note 2).

20 Ie the obligation imposed under the Estate Agents Act 1979 s 15 (see PARA 254). As to the meaning of 'clients' money' see PARA 251.

21 Ie the obligations imposed by the Estate Agents Act 1979 s 18 (see PARAS 245-247).

22 Ie the obligations imposed by the Estate Agents Act 1979 s 21 (see PARA 249).

23 Ie the obligations imposed by the Estate Agents Act 1979 s 21A (see PARA 250).

24 Estate Agents Act 1979 s 11(1B)(b)(ii), (iii) (as added: see note 2). An 'undesirable practice' is a practice mentioned in s 3(1)(d) (see PARA 271).

25 Estate Agents Act 1979 s 11(1), (1E), (1F) (as substituted and added: see note 2).

26 See PARA 280.

## UPDATE

### 239-282 Estate Agencies

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

## **279 Powers of entry and inspection**

NOTE 7--Reference to counsel or solicitor now to a relevant lawyer (ie counsel, a solicitor or other legal representative communications with whom may be the subject of a claim to privilege): Estate Agents Act 1979 s 11(8), (9) (s 11(8) amended, s 11(9) added, by Legal Services Act 2007 Sch 21 para 41).

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/10. ESTATE AGENCIES AND ACCOMMODATION AGENCIES/(1) ESTATE AGENCIES/(vi) Enforcement and Compliance/280. Entry and inspection by warrant.

## **280. Entry and inspection by warrant.**

A justice of the peace may, by warrant under his hand<sup>1</sup>, authorise an officer of an enforcement authority<sup>2</sup> to enter premises, if need be by force<sup>3</sup> if he is satisfied that there is reasonable ground to believe either that any books or documents which a duly authorised officer<sup>4</sup> has power to inspect<sup>5</sup> are on any premises<sup>6</sup> and their inspection is likely to disclose evidence of the commission of an offence under the Estate Agents Act 1979<sup>7</sup> or that such an offence has been, or is being or is about to be, committed on any premises<sup>8</sup>. As from 1 October 2008<sup>9</sup> a justice may also give such authorisation where he is satisfied that there is reasonable ground to believe that any books or documents which a duly authorised officer has power to inspect are on any premises and their inspection is likely to disclose evidence that a person has failed to comply with any statutory obligation imposed on him with regard to accounting for interest on clients' money<sup>10</sup>, the giving of information to clients with respect to remuneration, their prospective liabilities under the agency contract or agreed contractual variations<sup>11</sup>, notifying clients with regard to any personal interest he has in a proposed or intended transaction<sup>12</sup> or with regard to the keeping of permanent records<sup>13</sup>, or that a person has engaged in an undesirable practice<sup>14</sup>.

In any of the above circumstances, a justice may give an authorisation only if he is also satisfied:

- 248 (1) that admission to the premises has been or is likely to be refused and notice of intention to apply for a warrant<sup>15</sup> has been given to the occupier<sup>16</sup>;
- 249 (2) that an application for admission, or the giving of such a notice of intention, would defeat the object of the entry<sup>17</sup>;
- 250 (3) that the premises are unoccupied<sup>18</sup>; or
- 251 (4) that the occupier is temporarily absent and it might defeat the object of the entry to wait for his return<sup>19</sup>.

<sup>1</sup> As from 1 October 2008 a justice may give an authorisation under these provisions only on sworn information in writing, and any warrant continues in force for only one month: Estate Agents Act 1979 s 11(4), (4C) (s 11(4) substituted, s 11(4A)-(4D) added, by the Consumers, Estate Agents and Redress Act 2007 s 57(1),

(3), as from that date (see the Consumers, Estate Agents and Redress Act 2007 (Commencement No 4) Order 2008, SI 2008/905)).

2 As to enforcement authorities see PARA 278.

3 An officer entering premises by virtue of these provisions may take such other persons and equipment with him as he thinks necessary, and on leaving premises entered by virtue of a warrant under these provisions must, if the premises are unoccupied or the occupier is temporarily absent, leave them as effectively secured against trespassers as he found them: Estate Agents Act 1979 s 11(5).

4 Officers of local weights and measures authorities may, in certain circumstances, not be authorised for these purposes: see the Estate Agents Act 1979 s 11(6); the Estate Agents (Entry and Inspection) Regulations 1981, SI 1981/1519, reg 2; and PARA 279 note 1.

5 le under the Estate Agents Act 1979 s 11 (see PARA 279).

6 Or, as from 1 October 2008 (see note 1), the premises.

7 Estate Agents Act 1979 s 11(4)(a), (4A)(a)(i), (4D)(a) (as substituted and added: see note 1). An officer entering premises may take such other persons and equipment with him as he thinks necessary: s 11(5).

8 Estate Agents Act 1979 s 11(4)(a), (4A)(b) (as substituted and added: see note 1).

9 See note 1.

10 le the obligation imposed under the Estate Agents Act 1979 s 15 (see PARA 254). As to the meaning of 'clients' money' see PARA 251.

11 le the obligations imposed by the Estate Agents Act 1979 s 18 (see PARAS 245-247).

12 le the obligations imposed by the Estate Agents Act 1979 s 21 (see PARA 249).

13 le the obligations imposed by the Estate Agents Act 1979 s 21A (see PARA 250).

14 Estate Agents Act 1979 s 11(4A)(ii), (iii) (as added: see note 1). An 'undesirable practice' is a practice mentioned in s 3(1)(d) (see PARA 271).

15 le a warrant under the Estate Agents Act 1979 s 11(4) (see the text and notes 1-12).

16 Estate Agents Act 1979 s 11(4)(b), (4B)(a) (as substituted and added: see note 1).

17 Estate Agents Act 1979 s 11(4)(b), (4B)(b) (as substituted and added: see note 1).

18 Estate Agents Act 1979 s 11(4)(b), (4B)(c) (as substituted and added: see note 1).

19 Estate Agents Act 1979 s 11(4)(b), (4B)(d) (as substituted and added: see note 1).

## UPDATE

### 239-282 Estate Agencies

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/10. ESTATE AGENCIES AND ACCOMMODATION AGENCIES/(1) ESTATE AGENCIES/(vi) Enforcement and Compliance/281. Obstruction and personation of authorised officers.

## **281. Obstruction and personation of authorised officers.**

It is an offence<sup>1</sup>:

- 252 (1) wilfully to obstruct an authorised officer<sup>2</sup>;
- 253 (2) without reasonable cause to fail to give an authorised officer assistance or information he may reasonably require in performing his functions under the Estate Agents Act 1979<sup>3</sup>; and
- 254 (3) in giving information to an authorised officer, to make any statement which the person making the statement knows to be false<sup>4</sup>,

and until 1 October 2008<sup>5</sup> it is also an offence wilfully to fail to comply with any requirement properly made<sup>6</sup> by an authorised officer in connection with officers' powers of entry and inspection<sup>7</sup>.

A person who is not an authorised officer but purports to act as such also commits an offence<sup>8</sup>.

1 A person guilty of this offence is liable on summary conviction to a fine not exceeding level 4 on the standard scale: Estate Agents Act 1979 s 27(1) (s 27(1), (2) amended by virtue of the Criminal Justice Act 1982 ss 37, 46). As to offences by bodies corporate see PARA 242. As to defences see PARA 243 note 7. As to the standard scale see PARA 251 note 6.

2 Estate Agents Act 1979 s 27(1)(a). An 'authorised officer' is a duly authorised officer of an enforcement authority who is acting in pursuance of the Estate Agents Act 1979: s 27(3). As to enforcement authorities see PARA 278.

3 Estate Agents Act 1979 s 27(1)(c). As from 1 October 2008 s 27(1)(b) is repealed, s 27(1)(c) is amended, and s 27(1A) is added, by the Consumers, Estate Agents and Redress Act 2007 ss 58(4), 64, Sch 8 (see the Consumers, Estate Agents and Redress Act 2007 (Commencement No 4) Order 2008, SI 2008/905). The amendment of the Estate Agents Act 1979 s 27(1)(c) is consequential on the repeal of s 27(1)(b) and does not affect the meaning of head (2) in the text.

Section 27(1) does not require a person to answer any question or give any information if to do so might incriminate that person or that person's spouse or civil partner: s 27(4) (amended by the Civil Partnership Act 2004 s 261(1), Sch 27 para 62).

As from 1 October 2008 a failure to give assistance or information does not constitute an offence under the Estate Agents Act 1979 s 27(1)(c) if it is also a failure in relation to which an authorised officer may apply for an order under s 11A (see PARA 277): s 27(1A) (as so added).

4 Estate Agents Act 1979 s 27(1)(d).

5 See note 3.

6 Ie under the Estate Agents Act 1979 s 11 (see PARAS 279-280).

7 Estate Agents Act 1979 s 27(1)(b) (repealed as from 1 October 2008: see note 3).

8 Estate Agents Act 1979 s 27(2). A person guilty of this offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale: s 27(2) (as amended: see note 1).

## **UPDATE**

### **239-282 Estate Agencies**



Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/10. ESTATE AGENCIES AND ACCOMMODATION AGENCIES/(2) ACCOMMODATION AGENCIES/282. Illegal commissions, advertisements and discrimination.

## **(2) ACCOMMODATION AGENCIES**

### **282. Illegal commissions, advertisements and discrimination.**

A person is guilty of an offence<sup>1</sup> if he demands or accepts money in consideration of registering, or undertaking to register, the name or requirements of any person seeking the tenancy of a house<sup>2</sup>, or in consideration of supplying, or undertaking to supply, addresses or other particulars of houses to let, or if he issues any advertisement, list or other document describing any house as being to let without the authority of the owner<sup>3</sup> or his agent<sup>4</sup>.

A person who demands or accepts, from the owner of a house, remuneration payable to him as the owner's agent does not thereby commit the offence<sup>5</sup>, nor does a solicitor who demands or accepts remuneration in respect of business done by him as such<sup>6</sup>. Demanding or accepting payment for the display in a shop, or publication in a newspaper (including any periodical or magazine), of any advertisement or notice, or the display or publication of an advertisement or notice received for the purpose in the ordinary course of business, does not constitute the offence<sup>7</sup>.

It is unlawful to discriminate against any person, on the grounds of race, gender or disability, in the disposal or management of premises<sup>8</sup>.

1 Until a day to be appointed this offence is punishable on summary conviction by a fine not exceeding level 3 on the standard scale or up to three months' imprisonment, or both; as from that day it is punishable only by three months' imprisonment without the alternative or additional custodial sentence: Accommodation Agencies Act 1953 s 1(5) (amended by virtue of the Criminal Justice Act 1982 ss 38, 46; prospectively amended by the Criminal Justice Act 2003 s 332, Sch 37 Pt 9). At the date at which this volume states the law no day had been appointed for the coming into force of the amendment made by the Criminal Justice Act 2003. As to the standard scale see PARA 251 note 6.

2 'House' includes any part of a building which is occupied or intended to be occupied as a dwelling: Accommodation Agencies Act 1953 s 1(6).

3 'Owner' means the person having power to grant a lease of the house: Accommodation Agencies Act 1953 s 1(6).

4 Accommodation Agencies Act 1953 s 1(1). The Accommodation Agencies Act 1953 was originally temporary (see s 2(4) (repealed)), but was continued from time to time and has now been made permanent: see the Expiring Laws Act 1969 s 1(a). A requirement to pay a 'deposit' based on anticipated rent before supplying addresses of accommodation is within the mischief contemplated by these provisions, and an offence is committed although the 'deposit' paid is returnable in cases where the agent is unsuccessful in finding accommodation: *McInnes v Clarke* [1955] 1 All ER 346, [1955] 1 WLR 102, DC. An offence is also committed where in consideration of the supply of particulars of property, a person agrees to pay a percentage of one year's rent in the event of his taking a lease, and it is immaterial that no part of this commission is demanded or paid in advance: *Crouch and Lees v Haridas* [1972] 1 QB 158, [1971] 3 All ER 172, CA. A person who demands or accepts a returnable deposit may be guilty of an offence: *Saunders v Soper* [1975] AC 239, [1974]

3 All ER 1025, HL (distinguishing *McInnes v Clarke*). No offence is committed where an agency accepts payment under an agreement between the agency and the client that a fee will be payable if the agency finds acceptable accommodation and the client takes a tenancy of that accommodation: *Saunders v Soper*. An agreement for the making of a payment which contravenes the Act is illegal and unenforceable: *Crouch and Lees v Haridas*.

5 Accommodation Agencies Act 1953 s 1(2).

6 Accommodation Agencies Act 1953 s 1(3).

7 Accommodation Agencies Act 1953 s 1(4), (6).

8 See the Sex Discrimination Act 1975 ss 30, 31; the Race Relations Act 1976 ss 21, 22; and the Disability Discrimination Act 1995 ss 22, 23; and **DISCRIMINATION** vol 13 (2007 Reissue) PARAS 384, 463-464, 600, 602.

## UPDATE

### 282 Illegal commissions, advertisements and discrimination

TEXT AND NOTE 6--Now refers to a solicitor or authorised person: Accommodation Agencies Act 1953 s 1(3) (amended by Legal Services Act 2007 Sch 21 para 22(a)). 'Authorised person' means a person (other than a solicitor) who, for the purposes of the Legal Services Act 2007, is an authorised person in relation to an activity which is a reserved legal activity (within the meaning of that Act) (see **LEGAL PROFESSIONS** vol 65 (2008) PARA 512): Accommodation Agencies Act 1953 s 1(6) (definition added by Legal Services Act 2007 Sch 21 para 22(b)).